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# In the Supreme Court of the United States

OCTOBER TERM, 1985

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VERNE ORR, SECRETARY OF THE AIR FORCE, ET AL.,
PETITIONERS

*v.*

WILLIAM C. TURNER, ET AL.,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g), forbids a court, when construing a consent decree entered in a suit brought under Title VII against a public employer, from awarding a preference in promotion and other relief on the basis of race to a person who is not an actual victim of the employer's discrimination.

2. Whether the Due Process Clause of the Fifth Amendment forbids a court, when construing a consent decree entered in a suit against a federal employer, from awarding a preference in promotion on the basis of race to a person who is not an actual victim of the employer's discrimination.

## PARTIES TO THE PROCEEDING

The current case arises from an adjudication of a claim filed by Raymond Little for an alleged violation of a consent decree entered in 1981 in settlement of a class action suit challenging civilian employment practices at Eglin Air Force Base, Florida, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The defendants to the original suit were the Secretary of the Air Force and the Director of the Office of Personnel Management. The named plaintiffs in that original suit were William C. Turner; James G. Tanner; Robert A. Lewis; Freddie L. Cason; Charles A. Parker; Flora D. Bridges; Lorenzo Jones; Martha Ann Rodgers; Fredia Copeland; Juanita Mathis; Jo Ann Valentine; James A. Skinner; Novella Lewis; George L. E. Parks; Essie E. Bethune; James C. Cherry; James Baker; Michael W. Reynolds; National Association for the Advancement of Colored People, Fort Walton Beach Chapter; and the Progressive Community Improvement Organization of Fort Walton Beach, Florida. The class, as certified by the district court, consists of "[a]ll Negroes who were employed as civilians by the Eglin Air Force Base [Florida] on January 9, 1976, or at any time thereafter, all Negroes who could have filed administrative complaints of discrimination against Eglin Air Force Base on January 9, 1976, or at any time thereafter, and all Negroes who may in the future apply for employment at the Eglin Air Force Base" (App., *infra*, 36a).

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The Acting Solicitor General, on behalf of the Secretary of the Air Force and the Director of the Office of Personnel Management, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 759 F.2d 817. The order of the district court (App., *infra*, 21a-22a) is unreported. The orders of the special master (App., *infra*, 23a-34a) are unreported.

### JURISDICTION

The judgment of the court of appeals (App., *infra*, 19a-20a) was entered on April 18, 1985. On July 11,

1985, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including August 16, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in pertinent part:

> No person shall *** be deprived of life, liberty, or property without due process of law * * *.

2. Section 706(g) of the Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g), provides in pertinent part:

> No order of the court shall require the * * * hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was * * * refused employment or advancement * * * for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

3. Section 717(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), provides in pertinent part:

> All personnel actions affecting employees or applicants for employment * * * in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

4. Section 717(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), provides in pertinent part:

> [A]n employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

5. Section 717(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(d), provides:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

## STATEMENT

1. The case arises out of a complaint filed by respondent Raymond Little[1] alleging that petitioners had violated the terms of a consent judgment entered on January 12, 1981. That consent judgment was entered in settlement of a class action suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against, inter alia, the Secretary of the Air Force, for allegedly discriminating against civilian black employees and job applicants at Eglin Air Force Base, Florida, in connection with hiring, promotion, and other employment-related matters.[2] The class of plaintiffs certified by the district court included all blacks who had been employed at the base or who could have complained that they had been the victim of discrimination, as well as "all Negroes who may in the future apply for employ-

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[1] Although there were numerous parties involved in the original class action suit and the class defined by the district court includes future job applicants, Raymond Little is the only claimant involved in this particular suit.

[2] The consent judgment is reprinted in the Appendix, *infra*, 35a-69a.

ment" at the base (App., *infra*, 36a). However, the consent judgment expressly recites that the decree "is not premised upon a judicial finding of systemic discrimination against plaintiffs or the class they represent" (*id.* at 37a).

The judgment contained several sections, which address both the past and future conduct of the parties. For instance, the decree required the parties to make every reasonable effort to identify unsuccessful black applicants for employment at the base and blacks who would have applied, but did not, because they believed that doing so would have been futile[3] from March 24, 1972, until the date of the judgment (App., *infra*, 40a-42a). The judgment also created a fund to compensate those members of the plaintiff class (*id.* at 42a-47a) and gave priority in hiring decisions to "100 class members * * * who have been previously rejected or dissuaded from employment" at the base (*id.* at 47a; see *id.* at 47a-50a). The defendants agreed "to make a good faith effort" to achieve and maintain during the life of the decree minimum, specified proportions of blacks for specific job categories (*id.* at 50a; see *id.* at 50a-54a). In Section X, the defendants also agreed to "make every good faith effort" to promote blacks to supervisory positions "in proportion to the percentage of blacks in the occupancy category wherein the vacancy arises" (*id.* at 59a; see *id.* at 59a-61a, 65a).

The decree also created a mechanism for resolving disputes arising out of its implementation. Under Section IX, complaints that the judgment has been violated may be brought by the Plaintiffs' Monitor-

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[3] This determination was to be made in accordance with the guidelines established by *Teamsters* v. *United States*, 431 U.S. 324 (1978), and related cases (App., *infra*, 41a-42a).

ing Committee (PMC) before a special master, appointed pursuant to Fed. R. Civ. P. 53 (see App., *infra*, 58a), who is empowered to determine whether a violation has occurred and, if so, to award "all appropriate relief" (*ibid.*). Section VII creates specific procedures for determining when a failure to meet the goals constitutes a violation of the decree, essentially excusing such failures where the defendants have made "every reasonable effort to recruit and obtain black applicants" and "candidates could not reasonably be made available for selection opportunities" (*id.* at 53a). The consent judgment also establishes a guide for construction of its terms, providing that "[i]n interpreting the provisions of this Judgment which may become disputed among the parties, the law as set forth by Title VII of the Civil Rights Act of 1964 as construed by the courts, shall apply" (*id.* at 39a-40a).

2. a. In early 1982, respondent, an air conditioning mechanic at Eglin Air Force Base, applied for a promotion to the position of "Air Conditioning Equipment Mechanic Foreman" (App., *infra*, 23a).[4] Respondent, along with the other applicants, was considered for that position by a three-person selection committee, which evaluated his qualifications on the basis of his performance evaluations and his responses to questions put to him at a personal inter-

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[4] The position was originally designated as a temporary position, because it was listed among the "critical military skills" category of positions, which cannot be filled by civilian personnel on a permanent basis. See 1 Tr. 65-66; 3 Tr. 222-225. After that position had been filled, it was taken off that list, and the person then holding the job (Arthur Kelly) was elevated to permanent status. See, *e.g.*, 1 Tr. 66-68, 79-80; 3 Tr. 166-167, 225-226.

view (see *id.* at 24a-25a).[5] Respondent was not selected, and the position was filled by a white applicant, Arthur Kelly, on the basis of his superior qualifications.[6]

b. In September 1983, the PMC filed a complaint on respondent's behalf with the special master, alleging the "[b]y not promoting [respondent] to the position [filled by Kelly], the [petitioners] failed to 'recruit, hire, and maintain' the required percentage of black employees in the Craftsman category at the supervisory level" (R.E. 51).[7] Following an evidentiary hearing, the special master ruled in respondent's favor in an order issued on October 25 (App., *infra*, 23a-30a).

The special master found that respondent was a member of the plaintiff class, as defined by the decree, that the position for which respondent had applied was within the scope of the consent judgment's goals, and that respondent was qualified for that position (App., *infra*, 24a-25a).[8] The master also held that

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[5] See also, *e.g.*, 3 Tr. 139-140, 158-159, 177-178, 196-197; 10/7/83 Tr. 3-4, 5-7.

[6] The master assumed, but did not decide, that Kelly was more qualified for the position than respondent (App., *infra*, 29a). However, both Howard Brooks, the selection committee chairperson, and Sgt. James Sneed, another member of the committee, testified that Kelly was the committee's unanimous choice for the position, on the ground that he was the most qualified applicant. 3 Tr. 140-143, 181-182, 187.

[7] The complaint also alleged that petitioners had also violated the decree by failing to promote respondent to another foreman position ultimately given to a different applicant, Gerald Dickey (R.E. 2). "R.E." refers to the record excerpts filed in the court of appeals.

[8] The special master reserved decision on the question whether temporary positions were covered by the consent

petitioners had violated Section X of the consent judgment, which requires petitioners to make every "good faith effort" to promote blacks to supervisory positions where the percentage of blacks in those positions was less than a certain fixed ratio (*id.* at 28a).[9] Petitioners had violated the decree, the master held, by failing to inform the selection committee that the position of air conditioning foreman was listed among the "goals" of the consent judgment (*ibid.*). The master also rejected as legally insufficient petitioners' defense that they were entitled to select Kelly because he was more qualified than respondent, on the ground that the "good faith efforts" provision of the judgment required more of petitioners than the avoidance of discrimination (*ibid.*). Construing that provision to allow petitioners to select the most qualified candidate, which the master assumed was Kelly, not respondent (*id.* at 29a), would render that provision superfluous since the decree already forbade discrimination. However, the master did not find that respondent was denied the promotion because of his race; nor did the master find that the respondent would have been promoted "but for" the petitioners'

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judgment, but held that this position was subject to the decree, because petitioners had "admitted that at some point in time the position should have been subject to the Consent Judgment goals" (App., *infra*, 27a).

[9] The consent judgment set a hiring goal of 6% for the craftsman category (App., *infra*, 51a). Under Section X, petitioners agreed to make "every good faith effort" to fill supervisory positions "in proportion to the percentage of blacks in the occupational category wherein the vacancy arises" (*id.* at 61a). The special master found that, during the relevant time period, the number of blacks in the craftsman category was 5.67%, while the number of black supervisors in that category was 4.46% (*id.* at 25a).

failure properly to consider respondent's application. The master did not impose any remedy in his October 25 order. Instead, he directed the parties to resolve this issue.[10]

c. On November 28, 1983, after the parties were unable to agree upon the appropriate remedy, the master issued a second order, requiring petitioners to promote respondent to a newly vacant foreman position, and to award him retroactive seniority, back pay, and "other appropriate relief" from the date that the position was filled by Kelly (App., *infra*, 31a-34a).[11] In that order, the master did not consider whether alternative remedies would have fully compensated respondent for the violation that the master had found, such as requiring petitioners to reconsider respondent for a foreman position. Rather, the master simply awarded respondent the job outright.[12]

d. Petitioners appealed the special master's October 25 and November 28 orders to the district court, which affirmed the master's orders (App., *infra*, 21a-

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[10] Given his conclusion that petitioners had violated the consent decree by selecting Kelly rather than respondent, the master held that it was unnecessary to decide whether petitioners had violated the consent judgment by selecting Dickey rather than respondent for a different supervisory position (App., *infra*, 29a).

[11] On November 8, the master orally directed petitioners to place respondent in that position (App., *infra*, 32a). The master's November 28 order (which was dated November 14, but not entered until November 28) was entered nunc pro tunc for November 8 (*id.* at 34a).

[12] The master also denied petitioners' motion for a stay of his November 28 order (App., *infra*, 32a-34a).

22a). The district court upheld the master's finding that petitioners had violated the "good faith efforts" provisions of the consent decree, on the ground that the finding was not clearly erroneous (*id.* at 22a). The court also sustained the relief awarded in the master's November 28 order on the ground that it was "appropriate and supported by legal authority" (*ibid.*).

3. The court of appeals affirmed (App., *infra*, 1a-18a). At the outset, the court upheld, as not clearly erroneous, the master's finding that petitioners had violated the "good faith efforts" provision of the decree (*id.* at 4a-9a). The court explained that petitioners' failure to inform the selection committee that the position was subject to the consent decree's goals, or to take a variety of other steps to ensure that respondent would be adequately considered for the position, violated the decree (*id.* at 6a).[13] The court also agreed with the master that the "good faith efforts" provisions did not allow petitioners simply to select the most qualified applicant for the position, on the ground that construing the

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[13] The court did not define the term "good faith efforts" for purposes of the decree, but stated that petitioners could have taken a variety of procedural steps to satisfy that requirement (App., *infra*, 8a). As the court explained (*ibid.*), "[t]he Air Force could have notified the supervisors that the consent judgment goals applied to the vacancy, it could have taken the time to interview Little thoroughly and to review his personnel file to learn of his supervisory experience, it could have included minority members in the selection committee, it could have evaluated carefully its selection criteria to determine if the extra years of experience of the individual selected really made him 'better qualified' than Little with his better education and ample experience." The master made no findings in this regard, however.

judgment in that fashion would nullify the "good faith efforts" provision (*id.* at 7a). In addition, the court rejected the argument that the "good faith efforts" provision of the decree was aspirational and that the master's order had construed that provision to require promotion "preferences" or "quotas" in violation of Title VII and the Fifth Amendment (App., *infra*, 8a-9a). In the court's view, the master had simply found as a matter of fact that petitioners had failed to exhibit good faith on the facts of this case (*id.* at 8a). Accordingly, the court held that it was unnecessary in this case to decide whether the master's order could be upheld if it had required that class members be afforded preferential treatment on the basis of their race (*id.* at 8a-9a).

The court next held that the relief awarded by the master was authorized by Section IX, paragraph 4, of the consent judgment (App., *infra*, 58a), which empowers the master "to award all appropriate relief" for a violation of the decree (*id.* at 9a-10a). Petitioners had argued that the master's authority to award "appropriate relief" was limited by Section 706(g) of Title VII. The court rejected that argument, reasoning that "Title VII's remedy provisions are * * * of no assistance in determining what relief is 'appropriate' for the * * * violation of [a] consent judgment" because "Title VII deals with discrimination, not with violations of consent judgments" (App., *infra*, 10a). The remedial provisions of Title VII, the court thus held, are "of no assistance in determining what relief is 'appropriate' for the Secretary's violation of the consent judgment * * *" (*ibid.*) For the same reason, the court rejected petitioners' argument that respondent was not entitled to be awarded a promotion absent a finding that he would have received the promotion "but for" the violation of the decree,

as Title VII requires in cases of discrimination (*ibid.*).[14]

Finally, the court rejected the argument that, given the absence of any finding that respondent was a victim of discrimination, the remedy ordered by the master violated Section 706(g) of Title VII, as recently construed in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984) (App., *infra*, 10a-17a). The court found that *Stotts* was distinguishable from this case for three reasons. First, unlike this case, *Stotts* involved a layoff order infringing upon seniority rights, which are protected under Section 703(h) of Title VII (42 U.S.C. 2000e-2(h)) (App., *infra*, 12a). Second, unlike the layoff order at issue in *Stotts*, the order in this case did not injure any innocent third party, because no one had come forward to complain of the master's order (App., *infra*, 12a-13a).

The third and "most significant factor" distinguishing this case from *Stotts*, according to the court of appeals, was that the parties in this case had "voluntarily" adopted this consent judgment (App., *infra*, 13a). *Stotts* was thus inapposite because Section 706(g) "merely limits the power of a court to order certain remedies under Title VII in the absence of a finding that the promoted individual was a victim of discrimination" and "does not limit the remedies to which parties may voluntarily agree under a consent judgment" (App., *infra*, 14a). Relying chiefly upon the Sixth Circuit's decision in *Vanguards* v. *City of Cleveland*, 753 F.2d 479 (1985), petition for

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[14] See, *e.g.*, *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 403-404 n.9 (1977) (employer may prove that plaintiff would not have been hired or received a promotion notwithstanding his proof of discrimination); *Teamsters*, 431 U.S. at 369 n.53 (same).

cert. pending, No. 84-1999, and *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the court held that "[a]s *Weber* made clear, Section 706(g) does not bar voluntary affirmative action agreements, such as the consent judgment in this case; it is merely a limit on what a court may 'require' in a coercive action under Title VII" (App., *infra*, 17a). Because the master's order was comparable to the affirmative action plan upheld in *Weber*, the court held, that order did not violate Section 706(g) as construed in *Stotts* (App., *infra*, 17a).

## REASONS FOR GRANTING THE PETITION

This case presents several questions of substantial and recurring doctrinal and practical importance regarding the limitations upon the remedial authority of the federal courts in the implementation of consent decrees in litigation involving public employers brought under Title VII of the Civil Rights Act of 1964 and the Fifth and Fourteenth Amendments. Consent judgments, like the one at issue here, are frequently used to settle lawsuits in Title VII cases. This Court recently discussed the limitations that Section 706(g) of Title VII imposes upon a court's remedial authority under a consent decree in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984). In this case, the court of appeals held that the term "all appropriate relief," which is surely found in most, if not all, consent judgments, empowers a court to remedy violations of a consent decree in a manner that the court of appeals conceded could not have been done under Section 706(g) of Title VII. The court also ruled that Section 706(g) is altogether inapplicable to a court's exercise of remedial authority under a consent judgment in liti-

gation brought under Title VII. Finally, the court upheld the award of relief under a consent decree to a person who was not a victim of discrimination without at all considering the effect that such an order would have upon the equal protection rights of innocent third parties. The effect of that ruling is to empower the federal courts to rely upon the terms of a consent decree as the basis for a court's remedial powers in derogation of the precise limitations upon the court's authority that Congress has imposed and that this Court has recognized. The court of appeals' ruling thus clearly warrants review by this Court.

We do not believe, however, that plenary review of this case is the best course at this time. The question presented by this case regarding the proper scope of relief under Section 706(g) of Title VII is essentially identical to the question presented in *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland* (*Vanguards*), petition for cert. pending, No. 84-1999, upon which the court of appeals in this case relied (App., *infra*, 14a, 17a), and in *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, petition for cert. pending, No. 84-1656.[15]. We have filed an amicus curiae brief in *Vanguards* urging the

[15] *Vanguards* presents the question whether a district court may enter a consent judgment that explicitly bestows promotional preferences based upon race on persons who are not proven victims of discrimination. (*Vanguards* also presents the question whether a consent judgment may be entered over the objection of a party whose interests are adversely affected by the decree.) *Local 28* presents a similar issue, but the case comes to this Court in the context of a contempt citation. This case presents the question whether a court may construe a disputed provision of a consent decree that does not explicitly grant preferences based upon race to non-victims in a manner that has that effect.

Court to review the judgment of the court of appeals in that case, and we have filed a response to the petition in *Local 28* in which we have argued that the petition in that case should be held and disposed of as appropriate in light of *Vanguards*. We therefore do not believe that it is necessary at this time for the Court also to grant plenary review of this Title VII question as it is presented in this case. Instead, we request that the Court hold the petition in this case pending its disposition or decision in *Vanguards*. Should the Court conclude that *Vanguards* (or *Local 28*) is not an appropriate vehicle to resolve this Title VII issue, we urge the Court to grant review in this case.

Similarly, the constitutional question presented by this case is similar to the issue currently pending before the Court in *Wygant* v. *Jackson Bd. of Educ.*, cert. granted, No. 84-1340 (Apr. 15, 1985), in which we have also participated as an amicus curiae.[16] For reasons similar to those given above, we request that the Court hold the petition in this case pending its decision in *Wygant*. Accordingly, we refer the Court to the discussion of the Title VII and constitutional questions that is contained in our briefs in *Vanguards* (at 6-20) and *Wygant* (at 6-30)[17] and add only the following observations that are pertinent to this case:

1. The Court's decision in *Stotts*, like its earlier rulings in *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976), and *Teamsters* v. *United States*, 431

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[16] Whereas *Wygant* involves a layoff preference based on race, this case involves a preference in promotion based on race.

[17] We have served a copy of our briefs in *Vanguards*, *Local 28*, and *Wygant* upon counsel for respondents.

U.S. 324 (1977), recognized that Section 706(g) of Title VII has as its underlying policy the award of "make-whole relief only to those [persons] who have been actual victims of discrimination" (*Stotts*, slip op. 17; accord, slip op. 5-6 (O'Connor, J., concurring)).[18] The court of appeals did not disagree with that principle. Rather, the court held that it was inapplicable here, on the ground that the master's authority to award respondent a promotion stemmed from the consent decree, not from Section 706(g), and that in three respects the authority bestowed upon the master by the consent judgment is not limited by Section 706(g) (App., *infra*, 9a-17a). That analysis is flawed in each respect.

a. The first distinction offered by the court of appeals between this case and *Stotts* was that *Stotts* is limited to orders that infringe upon seniority rights (App., *infra*, 12a). But as we explained in our

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[18] That conclusion, as *Stotts* explained (slip op. 16-19), derives from the language, legislative history, and purposes of Section 706(g). Furthermore, the principle that Section 706(g) limits a court's equitable authority to ordering make-whole relief for the actual victims of discrimination is also consistent with both "the principal focus of the statute," which is on "the protection of the individual employee" (*Connecticut* v. *Teal*, 457 U.S. 440, 453-454 (1982); see also *Arizona Governing Comm.* v. *Norris*, 463 U.S. 1073, 1083-1086 (1983) (Marshall, J., concurring in the judgment in part); *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708-709 (1978)), and the equitable policy, reflected in the statute, that courts, in crafting relief under the Act, must consider the legitimate interests of "'innocent third parties'" (*Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239 (1982) (citation omitted); see also *Stotts*, slip op. 5-6 (O'Connor, J., concurring); *Norris*, 463 U.S. at 1110 (O'Connor, J., concurring); *Manhart*, 435 U.S. at 722-723; *Teamsters*, 431 U.S. at 371-376).

amicus curiae brief in *Vanguards* (at 10-11), Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), protects bona fide seniority systems; that provision is therefore directly relevant to the question of *liability* and only indirectly relevant to remedial questions. By contrast, Section 706(g), 42 U.S.C. 2000e-5(g), broadly governs any order entered in a Title VII case and focuses directly upon the *remedies* available once liability has been established or a consent judgment has been entered. *Stotts*, slip op. 16-17; see *Franks*, 424 U.S. at 758. Moreover, the opportunity to obtain a promotion may be as important to employees as seniority rights. The court of appeals therefore erred by limiting *Stotts* in this fashion.

b. The court of appeals also held that *Stotts* was inapplicable because the master's November 28 order did not disturb the interests of any innocent third party (App., *infra*, 12a-13a). But that ruling overlooks the fact that, but for that order, the Air Force would have accepted applications in a competitive process for the position that was awarded to respondent. See A.F. Reg. 40-335 (Nov. 12, 1980). The court of appeals thus failed to recognize that the master's November 28 order itself foreclosed innocent third parties from applying for that position.

c. Finally, the court of appeals held that the "most significant factor" distinguishing this case from *Stotts* was that petitioners had agreed to the entry of this consent decree, which the court likened to an affirmative action program (App., *infra*, 13a, 15a). Because petitioners had agreed to the terms of this decree, the court explained, the special master's orders, which simply required petitioners to adhere to their end of the bargain, was not a "coercive" order of the type with which Section 706(g) is concerned

(App., *infra*, 15a-17a). That analysis is both factually and legally unsound.

*i.* The court's error stems in part from its failure to distinguish between the consent judgment and the master's October 25 and November 28 orders. Although petitioners voluntarily entered into the consent decree, by so doing petitioners did not thereby consent to any and all orders that the special master might enter under the decree. The judgment empowers the master to award "all appropriate relief" for a violation of its terms. The only violation of the decree found by the master was petitioner's failure to inform the selection committee that the position at issue was covered by the "goals" of the consent judgment. We agree that the committee should have been so informed to ensure that respondent was carefully considered for the position.[19] However, it is well settled that the remedial powers of the federal courts extend no further than required by the nature and extent of the legal infraction involved. See, *e.g.*, *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 398-399 (1982); *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294 (1976). The appropriate remedy in this case is to require petitioners to reconsider respondent for the position and, if he is selected, to award him appropriate "make whole" relief, not to award him a promotion outright.[20]

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[19] Although the court of appeals stated that petitioners had failed "to make *any* effort to meet the consent judgment goal in filling this vacancy (App., *infra*, 8a; see page 9 note 13, *supra*), the only finding that the master made was that petitioners had failed to notify the selection committee that this position was covered by the consent decree's goals.

[20] We are informed by the Air Force that a grievance procedure and criteria for awarding promotions are contained

Moreover, the court of appeals failed to consider the entire consent judgment when construing the term "appropriate relief." See *Stotts*, slip op. 11-12. The consent decree expressly recites that Title VII "shall apply" to resolve disputed provisions of the decree (App., *infra*, 39a-40a) and thereby incorporates the limitations that Section 706(g) imposes upon the master's remedial authority. The consent decree itself therefore limits the relief that can be awarded under its terms to what Section 706(g) allows. Indeed, the term "all appropriate relief" contained in the decree is similar to the 1972 amendment to Section 706(g)—which added to the statute the term "any other equitable relief as the court deems appropriate" (42 U.S.C. 2000e-5(g))—that the Court held in *Stotts* (slip op. 18-19 n.15) did not expand "a court's authority to award make whole relief" (*id.* at 18). Finally, the court of appeals' erroneous construction of the decree is aggravated by the fact that Title VII provides "the exclusive judicial remedy for claims of discrimination in federal employment" (*Brown* v. *GSA*, 425 U.S. 820, 835 (1976)). The court of appeals thus erred by construing the term "all appropriate relief" to endow the master with broader remedial power than Section 706(g) provides. Accordingly, to the extent that the court appeals upheld the master's November 28 order on the ground that it was not "coercive" because petitioners had agreed in advance to relief of this sort, the court read far more into the consent judgment than its language will allow.

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in a collective bargaining agreement that was not made a part of the record below and was not referred to by any of the lower courts.

*ii.* The court of appeals' reasoning is more deeply flawed, however, because of the court's erroneous distinction between the remedial authority that a court enjoys when enforcing a judgment entered after a finding of liability and a judgment entered as a consent decree. In the court of appeals' view, Section 706(g) limits the relief that a court may award pursuant to a finding of liability, but does not restrict the remedies that a court may impose under a consent decree. The remedial provisions of Title VII, according to the Court, thus have no bearing upon the power that a consent judgment may bestow upon a court. App., *infra*, 16a-17a. That reasoning is plainly in error.

Most importantly, neither the text nor the legislative history of Section 706(g) supports the proposition that an order stemming from a consent decree stands on a different footing than an order that is entered following a judgment on the merits. See *Stotts*, slip op. 16-19. The policy underlying Section 706(g)—to provide "make-whole" relief only to victims of discrimination (*Stotts*, slip op. 17) by slotting them into their "rightful place" in the employment fabric (*Teamsters*, 431 U.S. at 372)—likewise does not support the court of appeal's distinction. And an order like the one at issue here can disturb "the competing interests of * * * innocent employees * * * and the employer" (*Stotts*, slip op. 5-6 (O'Connor, J., concurring); *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239-240 (1982); see page 15 note 18, *supra*) to as great an extent as one entered pursuant to a finding of liability after a trial on the merits. Indeed, to the extent that Section 706(g) reflects the "policy" that the interests of innocent third parties must be taken into account when courts

formulate relief under Title VII (see *Stotts*, slip op. 16, 20 n.17), the court of appeals' reasoning is unsound even on its own terms. Accordingly, the appropriate inquiry is not limited to the question whether the master's November 28 order is consistent with the terms of the consent judgment and with the substantive policies of Title VII; an essential part of the analysis is whether that order may properly issue consistently with Section 706(g).[21]

Moreover, under the court of appeals' rationale, the parties to a consent decree may endow a district court with remedial powers concededly in excess of—or directly contrary to—those powers that Congress has authorized, so long as the resulting decree is not inconsistent, in the court's words, with any "substantive policy of the underlying statute" (App., *infra*, 16a). Whatever the merits of that distinction where no third-party rights are involved, that distinction has no application to this case, because the interests of innocent third-parties must be taken into account when courts devise remedies under Title VII. A consent judgment entered in a Title VII suit thus can-

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[21] Nor can the master's November 28 order be sustained on the ground that it awarded respondent relief that petitioners could themselves have given him under an affirmative action program. The short answer to this argument, like the one given in *Stotts* (slip op. 20), is that petitioners did not award petitioner this promotion under an affirmative action program; the promotion was, instead, awarded by a court "order" entered to enforce a consent decree in a suit brought under Title VII, as to which Section 706(g) in terms applies. In addition, the 1972 amendments to Title VII, which the court of appeals adverted to but did not rely upon (App., *infra*, 12a n.2), are inapposite. *Stotts* expressly ruled that these amendments did not modify Section 706(g). Slip op. 18-19 n.15.

not be treated as a simple contract between two parties.

To be sure, a consent decree has some of the attributes of a contract (see *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975)), but it is nonetheless a judgment backed by the coercive power of the court (see *Pope* v. *United States*, 323 U.S. 1, 12 (1944); *United States* v. *Swift & Co.*, 286 U.S. 106, 115 (1932); cf. *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 83-84 (1981)). In that respect, the parties to a lawsuit cannot by agreement confer remedial authority upon a federal court beyond the limits fixed by Congress (see *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961)) any more than they can confer subject matter jurisdiction upon the court (see *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)) or demand that the court enforce a contract that is substantively invalid (see 29 U.S.C. 107 (outlawing "yellow dog contracts")); cf. *Shelly* v. *Kraemer*, 334 U.S. 1 (1948)). The Court expressly reaffirmed that principle in *Stotts*, holding that the statute underlying a consent decree provides not only the source but also the extent of a court's authority to enforce the terms of its judgment. Slip op. 13 n.9, 20 n.17; accord, slip op. 3 (O'Connor, J., concurring).

2. The court of appeals' decision also raises a substantial question under the Fifth Amendment Due Process Clause, as that provision applies the concept of equal protection to the federal government.[22] To

[22] The court of appeals reasoned (App., *infra*, 9a-10a) that the master's orders did not implicate the equal protection rights of innocent third parties because the master's construction of the "good faith efforts" provisions of the decree "does

the extent that the court of appeals is correct that the consent decree required racial preferences or that such a requirement may be viewed as voluntary action by virtue of petitioners' consent, the court of appeals' construction of the decree places the federal government in the same position as the public employer in *Wygant* v. *Jackson Bd. of Educ.*, *supra*. In both cases, the public employer, responding to allegations of past discrimination, would have undertaken to make race a determinative factor in employment decisions. Moreover, in both this case and *Wygant*, the courts of appeals relied in part upon this Court's decision in *United Steelworkers* v. *Weber*, *supra*, as a basis for upholding the consent decree. In that respect, the court of appeals' construction of the decree squarely raises the question, expressly re-

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not require an absolute promotion preference for class members" (*id.* at 9a). The court failed to recognize, however, that the master's October 25 and November 28 orders raised an equal protection issue in two separate ways: first, by construing the "good faith efforts" provisions of the decree to deny petitioners the right to defend against an alleged violation of the decree on the ground that they had promoted the most qualified applicant; second, by awarding a promotion to respondent, regardless of the relative qualifications of other eligible employees, in the absence of a finding that he was denied the promotion because of his race or that he would have received that promotion "but for" proven discrimination (see pages 6-8, *supra*). In these circumstances, the sole possible basis for awarding respondent such preferential treatment was his race, not his status as a victim of discrimination. Such differential treatment in the allocation of government benefits on the basis of "racial or ethnic criteria" (*Fullilove* v. *Klutznick*, 448 U.S. 448, 472, 480 (1980) (plurality opinion)) indisputably raises an equal protection issue concerning the rights of those persons who were passed over the relevant benefit.

served in *Weber* (443 U.S. at 200) and similar to the one currently before the Court in *Wygant*, of the constitutionality of non-victim-specific, race conscious hiring or promotion preferences by public employers. The position of the United States as to the constitutionality of such decisions is fully set out in our amicus curiae brief in *Wygant*.

Nor does the fact that such preferential treatment is embodied in a consent judgment that was ratified by a court lessen the appropriate degree of scrutiny. On the contrary, it is firmly settled that the judicial branch is subject to the same equal protection constraints that govern the executive and legislative departments. See *e.g.*, *Palmore* v. *Sidoti*, No. 82-1734 (Apr. 25, 1984); *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Shelly* v. *Kraemer*, *supra*. Nor does the aspect of a decree as a remedial resolution of an allegation of discrimination by an employer relieve this objection, since to the extent that a consent decree is remedial it may not travel outside the bounds of what is necessary to remedy the wrong, *i.e.*, providing relief to actual victims of discrimination. See, *e.g.*, *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 399; *Milliken* v. *Bradley (Milliken II)*, 433 U.S. 267, 280-282 (1977). Since there was no finding below that respondent was denied a promotion because of his race, the master's November 28 order cannot be sustained on the ground that it compensated an identified victim of discrimination for such a harm.

To the extent that the master's November 28 order can be taken less as a construction of the consent decree itself and more as a remedy ordered for a violation of what the master conceived to be petitioners' duty under the decree fairly to consider black

applicants, the same Fifth Amendment issue arises, but only in connection with the master's November 28 order. Concluding that petitioners have violated their obligation under the consent decree and that the decree—as we contend—does no more than establish procedures to assure fair consideration of minority applicants, then the remedy for such a violation is to accord the victim the procedure and consideration to which he was entitled. See *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 399 (the remedial power of the federal courts extends no further than necessary to remedy a legal infraction). By ordering his direct promotion, without allowing others to compete for the position, as a remedy for such a violation, the master's November 28 order conflicts with the equal protection component of the Fifth Amendment, because that order, which prefers respondent over other applicants on the basis of his race, is not precisely "tailored" to remedy the wrong that was done and cannot be shown to be necessary to serve a compelling state interest in remedying past discrimination. See U.S. Brief as Amicus Curiae Supporting Petitioners at 26-30, *Wygant*.

The court of appeals thus construed both the consent decree and the master's October 25 and November 28 orders in a manner that raises serious equal protection questions not previously addressed by this Court. Those questions, however, are best addressed only after the Court has determined that Congress clearly intended to authorize the courts to award such relief. That is plainly not the case here. In this case, the court of appeals adopted an erroneous construction of a consent decree in a manner that conflicts with the terms of Section 706(g) of Title VII,

the principles underlying that provision, as recently discussed in *Stotts*, and the need to ensure, as a matter of equity, that the interests of innocent third parties are not disregarded when a court crafts relief in Title VII litigation. In the absence of clearer evidence than the court of appeals was able to muster that Congress intended to allow a court to engage in the type of balancing necessary to make these decisions, the courts below should have construed Section 706(g) as prohibiting the master's November 28 order and thereby avoid creating the difficult constitutional issue raised by this case. Cf. *Stotts*, slip op. 11-12, 20.

## CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Local Number 93, Int'l Ass'n of Firefighters* v. *City of Cleveland (Vanguards)*, petition for cert. pending, No. 84-1999, and *Wygant* v. *Jackson Bd. of Educ.*, cert. granted, No. 84-1340 (Apr. 15, 1985). However, if the petition for a writ of certiorari in *Vanguards* is denied, the petition in this case should be granted.

Respectfully submitted.

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JULY 1985

**APPENDIX A**

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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No. 84-3266

WILLIAM C. TURNER, ET AL.,
PLAINTIFFS-APPELLEES

*v.*

VERNE ORR, SECRETARY OF THE AIR FORCE, ET AL.,
DEFENDANTS-APPELLANTS

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April 18, 1985

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Appeal from the United States District Court
for the Northern District of Florida

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Before GODBOLD, Chief Judge, HATCHETT, Circuit Judge, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This case concerns a final order entered by a special master and affirmed by the district court applying and enforcing the provisions of a consent judgment. The consent judgment was entered January 12, 1981, in settlement of a class action suit brought against the Air Force under Title VII of the Civil

Rights Act of 1964, 42 U.S.C. 2000e, for alleged racial discrimination against civilian black employees and applicants for employment at Eglin Air Force Base in Florida. This consent judgment was adopted by the district court after conducting a four-day fairness hearing on February 4, 1980; September 16, 1980; December 16, 1980; and January 12, 1981.

Under the consent judgment, defendants agreed "to make a good faith effort" to reach and maintain specified racial proportions on a percentage basis for specific job categories. (Judgment, § VII ¶ 1). Similarly, in Section X of the consent judgment, defendants agreed to "make every good faith effort" to fill supervisory positions with blacks "in proportion to the percentage of blacks in the occupancy category wherein the vacancy arises." (Section X, ¶ 3). The consent judgment defines the phrase "good faith effort" as meaning "every necessary and appropriate step will be taken to realize the specified objectives." (Section II, ¶ 9). The percentages specified in the consent judgment are stated not to be quotas; rather the specified proportions are expressly referred to as "goals." (Section VII, ¶¶ 2, 3, 4, 5).

Pursuant to § IX of the consent judgment, in September 1983, the plaintiffs' monitoring committee ("PMC") brought before the special master the complaint of Raymond Little, a member of the plaintiff class.

The complaint was in form of a statement filed by the PMC in which the following language was used:

> C. The Issues Brought Before The Special Master:
>
> Whether, in violation of Paragraph 4, Section IX of the Consent Judge, the Defendants discriminated against Raymond Little when they

> failed to hire him for two positions. The two vacancies at issue are both supervisory positions in Series 5306 at the WS-7 level, Air Conditioning Equipment Mechanic Foreman. The first was filled by Arthur Kelly on March 21, 1982.
> . . .

The special master found that the defendants in filling one of the supervisory positions had violated the provision of the consent judgment that required them to "make every good faith effort" to fill supervisory positions with blacks "in proportion to the percentage of blacks in the occupancy category wherein the vacancy arises." He ordered that Little be placed in a *vacant* supervisory position and awarded back pay. The court denied motion for stay, so Little is filling the job now.

Appellees have questioned the jurisdiction of this Court over this appeal. The special master ordered the immediate promotion of Little and instructed counsel to "calculate seniority, back pay, and other appropriate relief." Appellees contend that because the amount of the damages was undetermined, this was not an appealable final judgment. We disagree. The calculation required under the special master's report is purely ministerial in nature—a simple arithmetic calculation of back pay and seniority. Such ministerial acts concerning the execution of a judgment do not affect the finality of the decree.

## I. ISSUES

The issues for decision by this Court are as follows:

1. Did the special master err in finding that the Air Force had violated the "good faith" provisions of the consent judgment?

2. Is the remedy ordered by the special master authorized by the consent judgment?

3. Does the remedy ordered by the special master violate Section 706(g) of Title VII?

## II. DISCUSSION

### A. *Violation of the Consent Judgment*

The special master held that the Air Force violated the good faith provisions of the consent judgment. The Secretary contends that this finding was based on a construction of the consent judgment which is contrary to the intent of the parties.

As a preliminary matter, we must determine the appropriate standard of review. The district court indicated that "The question whether defendants acted in good faith is a pure question of fact with the special master's determination respecting it subject to review under the . . . clearly erroneous standard." The Secretary argues that the clearly erroneous standard is inapplicable because construction of a consent judgment is a question of law. He contends that the special master's finding of a violation was based on an interpretation of the legal duties placed on appellants by the term "good faith." Hence, the Secretary urges review *de novo* by this Court as a legal question.

The Secretary's argument fails to distinguish between construction of a consent judgment, which is a question of law, and a finding that appellants' actions failed to comply with the standards established by the consent judgment, which is a factual inquiry. As the Supreme Court indicated in the recent case of *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 2586, 81 L.Ed.2d 483 (1984)

(citation omitted), the "scope of a consent decree must be discerned within its four corners." Construction of a consent judgment is thus a question of law subject to *de novo* review. In the instant case, however, the scope of the consent judgment is not in issue. The consent judgment plainly requires that the Air Force "make every good faith effort to fill [supervisory] positions in proportion to the percentage of blacks in the occupational category wherein the vacancy arises." "Good faith effort" is defined in the consent judgment to mean that "every necessary and appropriate step will be taken to realize the specified objectives." The special master reviewed the specific actions of the Air Force in filling the supervisory vacancy and determined that those actions failed to meet the good faith standard established by the consent judgment. This is a factual determination which we review under the clearly erroneous standard.

The special master found that the good faith provisions had been violated on alternative grounds, as follows:

> The Special Master determined that the good faith provisions of the Consent Judgment goals section were violated by the Defendants when the Defendants hired Mr. Kelly, a caucasian male, without ever notifying the selecting supervisor at any point in time that this was a Consent Judgment goal position. Notifying selecting supervisors, in some manner, that the position is subject to the Consent Judgment goals would be a minimal action necessary to meet the good faith requirement of the Consent Judgment.
>
> The Special Master reaches the conclusion that the good faith requirement was not meet [sic] in this particular case on an alternative ground.

> The essence of the closing argument by the Defendants was that even if Mr. Little were qualified to fill the vacancy it was unreasonable to select anyone other than Mr. Kelly because Mr. Kelly was more qualified than Mr. Little. . . . Defendants' argument misses the mark. One would assume that in the absence of the Consent Judgment that whenever selecting officials have a number of qualified candidates from which to choose the officials would hire the best qualified applicant. If all that the good faith provision requires in this situation is the selection of the best qualified candidate then the provision is a nullity. The drafters of the Consent Judgment, by its express language, clearly intended that additional effort be exerted by the Defendants in meeting the goals. Thus, in this particular situation, assuming without deciding that Mr. Kelly was the best qualified candidate, the Defendants' argument that the good faith requirement was met because the supervisors selected the best qualified candidate from a group of qualified candidates is without merit.

These findings are amply supported by the record. The Secretary concedes that the selecting supervisors were not notified that the vacancy was one covered by a consent judgment goal. When the vacancy was filled originally on a temporary basis, the Air Force unilaterally decided that the goals did not apply to temporary positions. Later, the position was converted to permanent status noncompetitively. Thus, at no point were the selecting officials even notified that good faith efforts to meet the consent judgment goals were required.

Moreover, it is clear that good faith efforts were not made. As the special master found, the Air Force officials involved testified that they considered the good faith requirement to be met if they selected the best qualified candidate. The special master correctly found that such an interpretation would render the good faith requirement a nullity because discrimination is barred by Title VII and by Section II of the consent judgment.

Little was well qualified for the supervisory position. He had an Associate of Arts Degree, additional college courses, and specialized courses in air conditioning. He had 12 years experience as an air conditioning mechanic and extensive supervisory experience in the Army and Army reserve. Two of the three members of the all white selection committee testified that Little was less qualified than the individual selected because he had less supervisory experience. Yet both admitted that they were unaware of the full extent of Little's supervisory experience and had not reviewed his personnel file. Little testified that he was asked no questions about his prior supervisory experience and that his interview lasted approximately 15 minutes, while that of the selected individual may have lasted an hour. One of the committee members testified that education was one of three key factors in the selection, although he later testified it was less important than the other factors. The individual selected had only a GED high school diploma, while Little had an Associate of Arts Degree plus additional courses. One committee member testified that Little lacked the requisite mechanical skills, but this was contradicted by his own written performance appraisals of Little.

We need not decide what steps are sufficient to meet the good faith requirement of the consent judg-

ment. Numerous opportunities for the Air Force to make good faith efforts are suggested by the facts in this case, however. The Air Force could have notified the supervisors that the consent judgment goals applied to the vacancy, it could have taken the time to interview Little thoroughly and to review his personnel file to learn of his supervisory experience, it could have included minority members in the selection committee, it could have evaluated carefully its selection criteria to determine if the extra years of experience of the individual selected really made him "better qualified" than Little with his better education and ample experience. We cannot find that the Air Force demonstrated that it made *any* effort to meet the consent judgment goal in filling this vacancy. Thus, the special master's finding that the Air Force failed to comply with the good faith requirements of the consent judgment is not clearly erroneous.

Before turning to the remaining issues in this case, we must mention one false issue raised by the Secretary. The Secretary repeatedly asserts in his briefs that the special master construed the good faith provisions to require "the Secretary to hire or promote only class members until the 'goals' are met." There is simply no such holding in the special master's report. The special master held only that the steps taken in this case were insufficient to meet the good faith requirement and that the mere assertion that the best qualified candidate was chosen does not constitute a good faith effort. The Secretary builds on his erroneous interpretation of the special master's holding by arguing that a decree according an absolute promotion preference to class members violates both Title VII and the equal protection rights of innocent third parties. Because the special master's

order does not require an absolute promotion preference for class members, we need not reach these arguments.

B. *Remedy for Consent Judgment Violation*

Having found that defendants violated the consent judgment, the special master ordered defendants to promote Little to a vacant supervisory position with back pay. The Secretary contends that this remedy is not authorized by the consent judgment.

The consent judgment provides, "In the event that the Special Master determines that a violation of the Judgment has occurred, he shall be authorized to order all appropriate relief therefor. . . ." We hold that this provision fully authorized the special master's award of promotion and back pay in this case. The special master found that defendants had violated the good faith provisions of the consent judgment, and the relief he ordered was entirely appropriate for the violation.

The Secretary argues, however, that the remedies available to the special master are limited by the general provision in the consent judgment that "In interpreting the provisions of this Judgment which may become disputed among the parties, the law as set forth by Title VII of the Civil Rights Act of 1964 as construed by the courts, shall apply." The Secretary contends that Title VII authorizes the remedies of promotion and back pay only for actual victims of discrimination and, hence, these remedies should be reserved for victims of discrimination under the consent decree. We see no merit in this argument. The consent judgment specifically provides for "all appropriate relief" to be given for consent judgment violations. Nothing in Title VII addresses the ques-

tion of what relief is appropriate for such violations because Title VII deals with discrimination, not with violations of consent judgments. Title VII's remedy provisions are therefore of no assistance in determining what relief is "appropriate" for the Secretary's violation of the consent judgment, and the special master correctly relied upon a careful assessment of the nature of the violation in this case in deciding what relief was appropriate.

The Secretary also contends that the special master could not order back pay and promotion in the absence of a specific finding that "but for" the consent judgment violation, Little would have been promoted. The Secretary's argument is based on analogy to the principle under Title VII that even when discrimination has been proven, the plaintiff is not entitled to relief if the defendants prove by a preponderance of the evidence that plaintiff would not have been hired even in the absence of discrimination. *Lewis v. Smith*, 731 F.2d 1535, 1538 (11th Cir. 1984). The Secretary's analogy is faulty, however, because relief here is being granted not for violation of Title VII, but for violation of the consent judgment. The consent judgment authorizes the special master to order appropriate relief when he determines that the consent judgment has been violated. No "but for" finding is required.

We hold, therefore, that the relief ordered by the special master was authorized by the consent judgment.

C. *Title VII*

The Secretary's final contention is that the remedy ordered by the special master is in violation of Section 706(g) of Title VII of the Civil Rights Act of

1964 as recently interpreted by the Supreme Court in *Stotts*.

In *Stotts* the Supreme Court overturned an order enjoining the city of Memphis from laying off firefighters in accordance with the seniority system established in a collective bargaining agreement. The district court order was intended to prevent the layoffs from having a negative effect on minority gains made under a previous consent decree setting hiring and promotion goals for minorities. The Supreme Court held that the order was neither authorized by the original consent decree nor a legitimate modification of that decree that could be imposed on the city without its consent.

The Secretary contends that under *Stotts*, Section 706(g) of Title VII bars any court from ordering a promotion and back pay in the absence of a finding that the complainant suffered actual discrimination.[1] He points to the language in *Stotts* indicating that the policy of Section 706(g) is "to provide make-whole relief only to those who have been actual victims of illegal discrimination." *Id.* 104 S.Ct. at 2589. He notes that in this case there has been no finding of discrimination against Little. He argues that the

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[1] Section 706(g) provides in pertinent part:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) of this title.

relief provided to Little violates the rights of innocent third parties.

We do not find the *Stotts* decision to be controlling in the instant case. *Stotts* is distinguishable from the case at bar in at least three respects.[2] First, a primary basis of the Supreme Court's holding in *Stotts* is that the district court's order required the city to violate the provisions of a bona fide seniority system. Section 703(h) of Title VII specifically provides that it is not an unlawful employment practice to apply different standards pursuant to a bona fide seniority system. The court identified the "issue at the heart" of *Stotts* as "whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." *Id.* 104 S.Ct. at 2585. In the case at bar there is no contention that a bona fide seniority system will be affected by the special master's order.

A second factor distinguishing the current case from *Stotts* is that no third party rights are involved. In *Stotts* the court's order would have resulted in

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[2] Amicus NAACP Legal Defense and Educational Fund, Inc., suggests a fourth distinction: In this case, unlike in *Stotts*, the employer involved is the federal government. When Congress passed the Equal Employment Opportunity Act of 1972, one of its central concerns was the relegation of minorities to low status jobs in the federal service. It therefore enacted Section 717, not only making Title VII applicable to the federal government, but also imposing unique affirmative action obligations on federal agencies. Amicus thus contends that, at least as to the federal government, Section 706(g) does not bar enforcement of effective affirmative action. Because we find the court's order fully supported on other grounds, we need not reach this contention.

white employees being laid off in place of less senior black employees. In this case, the special master ordered Little promoted to a vacant position. No white employee was displaced to make room for Little. That no third parties were injured is attested by the fact that no non-class member has attempted to intervene in this suit. When the consent judgment was originally entered a fairness hearing was held, and no non-class members objected to the consent judgment, although notice was given throughout the Air Force base. The Secretary nevertheless argues that the rights of innocent third parties were violated by the special master's order. We question the standing of the Secretary to assert the rights of third parties whom he has been unable to identify.

Finally, the most significant factor distinguishing this case from *Stotts* is that the consent judgment here was voluntarily entered into by the parties. In *Stotts*, the city objected to the modified decree which was before the Supreme Court. *Stotts* therefore dealt with the power of a court to modify a consent judgment over the objection of one of the parties. The Supreme Court specifically held that the order of the district court was not authorized by the original consent decree. In contrast, we have held here that the special master's order was fully authorized by the consent judgment agreed to by the Secretary and the plaintiff class. Here, unlike in *Stotts*, the special master specifically found that the Air Force had violated the consent judgment it had voluntarily entered.

This distinction makes the legal basis of *Stotts* inapplicable. *Stotts* relied on Section 706(g) of Title VII which provides that "[n]o order of the court shall require the . . . promotion of an individual . . . if such individual was refused . . . advancement . . .

for any reason other than discrimination." This provision merely limits the power of a court to order certain remedies under Title VII in the absence of a finding that the promoted individual was a victim of discrimination. It does not limit the remedies to which parties may voluntarily agree under a consent judgment. *See Vanguards of City of Cleveland v. City of Cleveland*, 753 F.2d 479, 487-488 (6th Cir. 1985). The Supreme Court recognized that cases like this are different from *Stotts* when it stated:

> [T]he Court of Appeals was of the view that the District Court ordered no more than that which the City unilaterally could have done by way of adopting an affirmative action program. Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that in this case the City took no such action and that the modification of the decree was imposed over its objection.

*Stotts*, 104 S.Ct. at 2590.

*Stotts* must be read in light of the Supreme Court's holding in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). In *Weber*, the Court approved a voluntary agreement between the employer and the union providing for affirmative action. The Court stated:

> [S]ince the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act. The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily

> agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan.

*Id.* at 200, 99 S.Ct. at 2726 (emphasis in original).

The Kaiser plan called for a 50-50 placing of blacks and whites in the employer's craft training program until the number of black craft employees approximated the percentage of blacks in the labor force. The Court found this not to be in violation of the Act. The Court noted that:

> [A]n interpretation of the sections that forbade all race-conscious affirmative action would bring about an end completely at variance with the purpose of the statute and must be rejected.

*Id.* at 202, 99 S.Ct. at 2726 (citations omitted).

In the instant case, the Secretary and the plaintiff class voluntarily negotiated an agreement which, when approved by the district court, became a consent judgment. This agreement is in compliance with *Weber*. It provides specific affirmative steps to be taken by the Air Force and establishes a remedial scheme for failure to comply with its requirements. The Air Force failed to take the steps it had voluntarily agreed to take and the special master ordered a remedy as authorized by the consent judgment. Neither Section 706(g) nor the *Stotts* decision is applicable.

The Secretary contends, however, that Section 706(g) is a limitation on the court's power and precludes the court from adopting a voluntary consent decree which includes remedies that a court could not order in a coercive action under Title VII. He

poin[illegible]s to the following language in a footnote in *Stotts:*

> "[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 [81 S. Ct. 368, 373, 5 L.Ed.2d 349] (1961). In recognition of this principle, this Court in *Wright* held that when a change in the law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified over the objections of one of the parties bound by the decree. By the same token, and for the same reason, a district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute.

*Stotts* 104 S.C. at 2587 n. 9. This footnote does not indicate that a court is barred from approving a consent decree that provides relief beyond that authorized in the underlying statute. "Consent decrees need not be limited to the relief that a court could provide on the merits." *Sansom Committee v. Lynn*, 735 F.2d 1535, 1538 (3rd Cir. 1984) (citation omitted). The Court quoted the language from *Wright* to support its holding that a court cannot enter "a disputed modification" of a consent decree which is inconsistent with the underlying statute. *Wright* involved a decree which had become patently inconsistent with the substantive policy of the underlying statute. As indicated in *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1118, 1125

(D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984) (citation omitted),

> The statement that a district court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce" means only that the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interest of each party to the settlement.

*See Vanguards*, at 488-489 (citation omitted). The voluntary consent judgment in this case is entirely consistent with the purposes of Title VII, "a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long.'" *Weber*, 443 U.S. at 204, 99 S.Ct. at 2728, *quoting* 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey). As *Weber* made clear, Section 706(g) does not bar voluntary affirmative action agreements, such as the consent judgment in this case; it is merely a limit on what a court may "require" in a coercive action under Title VII.

## III. CONCLUSION

In conclusion, we hold that the special master and the district court correctly found that the Air Force had violated the good faith provisions of the consent judgment. The remedy ordered for this violation is fully authorized by the consent judgment and, therefore, is not in violation of Section 706(g) of Title VII.

The judgment of the district court is AFFIRMED.*
The mandate shall issue FORTHWITH.

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* Before this panel is a motion of Raymond Little to consolidate with this appeal a subsequent appeal by the Secretary of the Air Force from a judgment granting attorney's fees to Messrs. Spriggs and Warren. That appeal is No. 84-3694. It is based in large part on the denial by the special master of a motion to disqualify Messrs. Spriggs and Warren as counsel for the PMC. The Secretary strongly objects to such consolidation, one ground for such objection being "consolidation of these two appeals clearly would result in a substantial delay in deciding Mr. Little's case, contrary to the interests of both the Secretary and Mr. Little in a prompt adjudication of the appeal." Another ground for his opposition is stated: "A prompt decision in No. 84-3266 (this case) is needed to provide guidance to the district court and the parties in these other proceedings."

Agreeing with the Secretary's contention that a prompt decision of the Little appeal is required, we have denied the motion to consolidate the two appeals.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 84-3266

D.C. Docket No. 76-00175

WILLIAM C. TURNER, ET AL., PLAINTIFFS-APPELLEES

*versus*

VERNE ORR, Secretary of the Air Force, ET AL.,
DEFENDANTS-APPELLANTS

---

Appeal from the United States District Court for the Northern District of Florida

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Before GODBOLD, Chief Judge, HATCHETT, Circuit Judge, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED.

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 18, 1985

For the Court: Spencer D. Mercer
Clerk

By: /s/ Miguel J. Cortez, Jr.
Deputy Clerk

Issued as Mandate: Apr. 18, 1985

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

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PCA 76-175

WILLIAM C. TURNER, ET AL., PLAINTIFFS

*vs.*

SECRETARY OF THE AIR FORCE, ET AL., DEFENDANTS

---

ORDER

Before this court is defendants' appeal from the Special Master's ruling (doc. nos. 2338 and 2405) respecting Raymond Little's claim of consent judgment violation.

Section IX, paragraph 4, of the consent judgment does refer, in this type situation, to the right of a party to "appeal" any such decision.

Under the recent ruling of Court of Appeals for the Eleventh Circuit, however, the Special Master is to be regarded as a Special Master appointed under Rule 53, F.R.Civ.P.

Under that rule the Special Master prepares a report in which, if required, there are included findings of fact and conclusions of law. The court accepts the Special Master's findings of fact unless clearly erroneous.

While some of the procedures provided for by Rule 53, F.R. Civ.P., may not have been strictly followed in this particular instance, no party objects on such

ground. Instead they appear in agreement that the Special Master's ruling on this claim is properly before this court for its decision.

The Special Master found the defendants violated the good faith provision of the consent judgment. This court concludes, under the holdings in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), *Jacobs v. New Orleans*, 484 F.2d 24 (5th Cir. 1973), and *Boscarino v. Nelson*, 518 F.2d 879 (7th Cir. 1975), the question whether defendants acted in good faith is a pure question of fact with the Special Master's determination respecting it subject to review under the rule's clearly erroneous standard.

Here the Special Master's ruling is not clearly erroneous. To the contrary, it is amply supported by the record. Were the usual appeal standard of affirmance unless prejudicial error appears here applied the finding would be no such error appears.

The Special Master was also correct in his interpretation of the requirements of the consent judgment and the remedy provided by him in his order dated November 14, 1984 is appropriate and supported by legal authority.

It is ORDERED as follows:

1. The Special Master's order of October 25, 1983, on the claim of Raymond Little, and the relief chosen by him, are treated by this court as a report under Rule 53, F.R.Civ.P.

2. Treated as such report, it is now adopted in whole by this court.

DONE AND ORDERED this 13th day of February, 1984.

/s/ Winston E. Arnow
WINSTON E. ARNOW
Senior Judge

**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

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PCA 76-175

LITTLE, RAYMOND
WILLIAM C. TURNER, ET AL., PLAINTIFFS

*v.*

SERETARY OF THE AIR FORCE, ET AL., DEFENDANTS

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[Filed Oct. 25, 1983]

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ORDER

Before the Special Master is the claim of Mr. Raymond Little, presented through the motion for hearing served on the Defendants on September 9, 1983. Mr. Little alleged a violation of section IX, paragraph 4 of the Consent Judgment (January 12, 1981), in that the Defendants discriminated against him when they failed to hire him for an Air Conditioning Equipment Mechanic Foreman position, WS 5306-7, filled by Mr. Arthur Kelly on March 21, 1982 (hereinafter the Kelly vacancy) and an Air Conditioning Equipment Mechanic Foreman position, WS 5306-7, filled by Mr. Gerald Dickey on December 12, 1982 (hereinafter the Dickey vacancy).

On September 20, 1983, the Defendants served upon the PMC their response to the PMC's motion for hearing alleging that the claim of Mr. Little regarding the Dickey vacancy was not timely raised by the claimant, and on September 20, 1983, the PMC on behalf of Mr. Little served a motion on the Defendants in the nature of summary judgment regarding both the Kelly and the Dickey vacancies. The Special Master heard oral argument on these matters on September 23, 1983. The Special Master denied both motions in an order dated October 3, 1983, *nunc pro tunc*, September 23, 1983 (filed October 6, 1983). The hearing on the merits of Mr. Little's claim commenced October 3, 1983.

## THE KELLY VACANCY

*Findings of Fact.*

1. Mr. Little is a member of the class. See *Consent Judgment*, section I and section IX, paragraph 4.

2. Mr. Little was qualified for the Kelly vacancy. Mr. Little was among the top fifteen candidates ultimately referred to the selecting supervisor. *Little* Exhibit 20. Mr. Little had an Associate of Arts degree. Mr. Little had supervisory experience while in the United States Army and in the Air Force Reserves. Mr. Little received training in the air conditioning field and had been working in this field for a number of years. Mr. Little received either excellent performance rating or average and above average ratings from his supervisor during the time in question.

The Defendants attempted to show that Mr. Little was not qualified for this position by testimony from two of the selecting officials. This testimony revealed

that Mr. Brooks' decision was based primarily upon the fact that past supervisory experience was very important, but Mr. Brooks admitted he was unaware of Mr. Little's past supervisory experience. Mr. Brooks stated that his decision was also based upon Mr. Little's lack of mechanical skills, but the performance ratings prepared by Mr. Brooks for Mr. Little contradict this assessment. Senior Master Sergeant Sneed stated that his decision was based upon Mr. Little's lack of supervisory experience, but he also admitted that he was unaware of the full extent of Mr. Little's past experience. Upon reviewing all the evidence, the Special Master is persuaded that Mr. Little established that he was qualified to fill this position.

3. Mr. Arthur Kelly, a caucasian male, was selected to fill the vacancy and Mr. Little, although available, was not selected. *See* Little Exhibit 13 & 15.

4. The position was one in which the Consent Judgment goals applied. The position was a first level supervisory position included in section X, paragraph 3 of the Consent Judgment. This position is in the Craftsman occupational category. *See* Attachment C of the Consent Judgment. During the time in question the percentage of black first level supervisors in the Craftsman category was 4.46%. *See Little* Exhibit 25. During the time in question the percentage of blacks in the Craftsman category was 5.67%. *See* Little Exhibit 9A. Therefore, the provision of section X, paragraph 3, "to fill said positions in proportion to the percentage of blacks in the occupational category wherein the vacancy arises" was not met.

The Defendants offered two arguments why this position was not controlled by the Consent Judgment goals. First, the Defendants argued that the Consent

Judgment goals did not apply to this particular position. The Defendants argued that if the goal for a particular category was, hypothetically, 10%, then the first nine positions filled by Eglin Air Force Base were not subject to the Consent Judgment goals and only the tenth position was subject to the goals and the additional good faith effort thereby imposed. The Defendants stated that it was their practice to wait until the tenth vacancy before flagging the Form 176 so as to inform the supervisors that a Consent Judgment goal existed in the occupational category.

The Special Master has serious concern whether the good faith language in the Consent Judgment can possibly be met if the Defendants only inform supervisors at the very last possible opportunity that the occupational category is one in which the goals would apply. Defendants' counsel, after the close of the hearing, stated in chambers that they inaccurately represented the practice of Eglin Air Force Base and that the practice in instances where there is such underrepresentation is to inform the supervisors of the Consent Judgment goal at the time that the first vacancy occurs. Upon this representation, the Special Master assumed that the Defendants withdrew this argument regarding the lack of Consent Judgment goals for this position.

Secondly, the Defendants argued that the Consent Judgment goals did not apply when the Kelly vacancy was originally filled in March 21, 1982, because it was designated as a temporary fill action. Although the position was filled competitively, the Defendants unilaterally determined that the Consent Judgment goals do not apply to temporary positions and so informed the supervisors by not marking the referral forms. *See* Little Exhibit 13. The position was con-

verted to a permanent position on July 25, 1982. *See* Defendants Exhibit 4. At that time, due to the manner in which the conversion was processed by Mr. George Bates, an Eglin Air Force Base Staffing Specialist, the only person who could obtain the permanent position was Mr. Kelly, a caucasian male. The Defendants admitted in closing argument that this manner of processing effectively removed this position from being subject to the Consent Judgment goals at any point in time. The Defendants admitted that when the position was converted to a permanent position it should have been filled competitively and it should have been subject to the Consent Judgment goals.

The Special Master determines that the policy of Eglin Air Force Base as implemented in this particular case had the practical effect of circumventing the Consent Judgment goals. Without determining whether the temporary position was subject to the Consent Judgment goals, the Special Master determines that since in this particular case the Defendants admitted that at some point in time the position should have been subject to the Consent Judgment goals, the Defendants' argument is without merit.

*Conclusions of Law.*

The Consent Judgment, section VII, paragraph 1, provides, "Throughout the life of the Judgment, Eglin shall make every good faith effort to recruit, hire and maintain at a minimum the following racial proportions for the indicated series and occupational categories." Good faith is defined as "every necessary and appropriate step will be taken to realize the specified objectives." *Consent Judgment*, section II,

paragraph 9. These provisions are implemented through section IX, paragraph 4 of the Consent Judgment which provides, "All class members wishing to present complaints of *Judgment violation* shall contact the Plaintiffs' Monitoring Committee. . . . In the event that the Special Master determines that a violation of the *Judgment* has occurred, he shall be authorized to order all appropriate relief therefor, including the award of costs and attorneys fees."

The Special Master determines that the good faith provisions of the Consent Judgment goals section were violated by the Defendants when the Defendants hired Mr. Kelly, a caucasian male, without ever notifying the selecting supervisor at any point in time that this was a Consent Judgment goal position. Notifying selecting supervisors, in some manner, that the position is subject to the Consent Judgment goals would be a minimal action necessary to meet the good faith requirement of the Consent Judgment.

The Special Master reaches the conclusion that the good faith requirement was not meet in this particular case on an alternative ground. The essence of the closing argument by the Defendants was that even if Mr. Little were qualified to fill the vacancy it was unreasonable to select anyone other than Mr. Kelly because Mr. Kelly was more qualified than Mr. Little. The Defendants supported this argument by testimony and documentary evidence attempting to show that Mr. Kelly was more qualified for this position than Mr. Little. The testimony of Mr. George Bates, the Eglin Air Force Base Staffing Specialist who filled this position, although called as the complainant's witness, is illustrative. Mr. Bates stated that even if a black person is on a certificate for which a Consent Judgment goal exists, the only criterion for

selection is to determine who is the best qualified candidate. In addition, Mr. Brooks, the Defendants' witness, testified that even if he had known there was a Consent Judgment goal it would have not affected his decision to hire Mr. Kelly because all that is required by the Consent Judgment is that extra consideration be given to the black applicant, and one should hire the black applicant if he is the best qualified.

Defendants' argument misses the mark. One would assume that in the absence of the Consent Judgment that whenever selecting officials have a number of qualified candidates from which to choose the officials would hire the best qualified applicant. If all that the good faith provision requires in this situation is the selection of the best qualified candidate then the provision is a nullity. The drafters of the Consent Judgment, by its express language, clearly intended that additional effort be exerted by the Defendants in meeting the goals. Thus, in this particular situation, assuming without deciding that Mr. Kelly was the best qualified candidate, the Defendants' argument that the good faith requirement was met because the supervisors selected the best qualified candidate from a group of qualified candidates is without merit.

## THE DICKEY VACANCY

Based on the foregoing resolution of the Kelly vacancy and because the Dickey vacancy was for the same type of position at the same grade level but was filled later in time, the Special Master does not need to reach the merits of the Dickey vacancy.

## CONCLUSION

Based on the foregoing, the Special Master determines that Mr. Little has proven that the Defendants violated the good faith provisions of the Consent Judgment when the Defendants selected Mr. Kelly for the Air Conditioning Equipment Mechanic Foreman position, WS-5306-7. The Special Master orally announced this ruling as to liability on October 7, 1983, stating that a written order would follow. At that time counsel for the Defendants stated that there was a WS-5306-7 position which had become vacant and which would be frozen pending the written order. Pursuant to an agreement between counsel, the remedy portion of the hearing was held in abeyance pending the outcome of the liability issue. The Special Master directs counsel to attempt to resolve the remedy phase by stipulation to be approved by the Special Master. If the parties are unable to resolve this matter, it may be presented to the Special Master for resolution.

DONE AND ORDERED this 25th day of October, 1983, *nunc pro tunc*, October 7, 1983.

/s/ Harold B. Crosby
HAROLD B. CROSBY
Special Master

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

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PCA 76-175

LITTLE, RAYMOND
WILLIAM C. TURNER, ET AL., PLAINTIFFS

*v.*

SECRETARY OF THE AIR FORCE, ET AL., DEFENDANTS

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[Filed Nov. 28, 1983]

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ORDER

On October 25, 1983, the Special Master entered an order in the above entitled cause which held:

> Mr. Raymond Little has proven that the Defendants violated the good faith provisions of the Consent Judgment when the Defendants selected Mr. Kelly for the Air Conditioning Equipment Mechanic Foreman position, WS-5306-7 . . . . At that time counsel for the Defendants stated that there was a WS-5306-7 position which had become vacant and which would be frozen pending the written order. Pursuant to an agreement between counsel, the remedy portion of the hearing was held in abeyance pending the outcome of the liability issue. The Special Master directs

counsel to attempt to resolve the remedy phase by stipulation to be approved by the Special Master.

*Turner v. Secretary of the Air Force*, PCA 76-175 (Crosby, Special Master) (filed October 25, 1983).

On November 7, 1983, the Defendants requested that the Special Master determine whether Mr. Little was to be placed in the WS-5306-7 position as a portion of the remedy. On the following day Defendants' counsel reported that the pending vacancy was the same type of position filled by Mr. Kelly, a WS-5306-7 position in the Air Conditioning Refrigeration Shop in the Civil Engineering Organization. The Special Master thereupon orally announced that the Defendants were directed to immediately commence placing Mr. Little in the vacancy. The Special Master directed the parties to endeavor to resolve the other aspects of the remedy.

On November 11, 1983, at the Defendants' request, a telephone conference was held at which time the Defendants orally announced that they would be appealing the Special Master's decision. The Defendants requested that the Special Master stay the filling of the WS-4306-7 position, pending the appeal. The parties agreed to argue the motion for a stay orally at that time. After hearing argument from both parties the Special Master took the matter under advisement.

The granting of a stay is within the discretion of the court. In determining whether to grant a motion for stay, the Special Master must consider the following four factors: whether the Defendants have made a strong showing of likelihood of success on the merits; whether the Defendants have made a showing

of irreparable injury if the court does not grant the stay; whether the stay would substantially harm other parties; whether the stay would serve the public interest. *Coastal States Gas Corp. v. Department of Energy*, 609 F.2d 736, 737 (5th Cir. 1979).

The Defendants' only argument as to the first requirement was that their appeal was not frivolous. This argument does not meet the first requirement. As to the second and fourth requirements, the Defendants argued that if their appeal was successful, then the public interest would be harmed by the Defendants' workforce being disrupted by Mr. Little being placed in the position and subsequently removed. In addition, the Defendants argued that they would have difficulty in recovering the additional salary that Mr. Little would receive. The Special Master notes that the Defendants have frequently filled other positions, and in fact filled this same type of position, on a temporary basis without disrupting the workforce. Therefore, the Special Master determines that the filling of this position with a qualified individual would not harm the public interest, even if Mr. Little was subsequently removed. The Special Master questions whether the Defendants will have difficulty in recovering the additional salary, but even if there were such difficulty, the Special Master determines that such difficulty would not support an irreparable injury requirement. Finally, the Special Master notes that even if the Defendants were to adjust Mr. Little's records so as to reflect an earlier starting date, the loss of actual experience in a position to which Mr. Little is entitled may harm his future ability to advance. Thus, the granting of a stay may harm other parties.

After due consideration of the aforementioned guidelines, the evidence adduced in the litigation of this claim, and the argument of counsel, the Special Master determines that the Defendants' have not met any of the requirements for a stay. Therefore, the Defendants' request for a stay should be and it is hereby denied.

The Special Master directs that Defendants immediately commence the placement of Mr. Little in the pending, presently unfilled WS-5306-7 vacancy. Counsel for Mr. Little shall calculate seniority, back pay and other appropriate relief with the appropriate set-offs, commencing as of March 21, 1982, the date on which the Kelly vacancy was filled temporarily. This calculation shall be submitted to the Defendants for their comments, and then to the Special Master for approval. The Special Master determines that the presentation of this claim to the Special Master was reasonable, and that in addition, Mr. Little prevailed, and therefore counsel may submit a request for an award of reasonable attorneys' fees.

DONE AND ORDERED this 14th day of November, 1983, *nunc pro tunc*, the 8th day of November, 1983.

/s/ Harold B. Crosby
HAROLD B. CROSBY
Special Master

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Civil Action No. PCA 76-175

WILLIAM C. TURNER, ET AL., PLAINTIFFS

*v.*

HANS M. MARK, Secretary of the
Air Force, ET AL., DEFENDANTS

## CONSENT JUDGMENT

SECTION I:

### INTRODUCTION

This case arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, and was brought against the Secretary of the Air Force and the Chairman of the Civil Service Commission [now Director, United States Office of Personnel Management (OPM), substituted by Order, dated March 9, 1979]. The plaintiffs in this case are the Ft. Walton Branch of the National Association for the Advancement of Colored People, the Progressive Community Improvement Organization, and 18 individual black employees of and applicants for employment at Eglin Air Force Base. This case arose upon the informal administrative complaint of the plaintiffs, Ft. Walton NAACP, *et al.*, filed in February 1976. The plaintiffs filed their Complaint with the Court on November 10, 1976.

In their Complaint and Amended Complaint, the plaintiffs have alleged that the defendant, Secretary of the Air Force, has maintained patterns and practices of discrimination against black employees and applicants for employment at Eglin AFB, which practices include discrimination in hiring, promotion, transfer, conditions of employment and retaliation against black and white employees for protesting unlawful employment practices. In his Answer, the Secretary has denied the allegations of the Complaint. The plaintiffs have also alleged that the defendant, Director, Office of Personnel Management, has long been aware of the unlawful discriminatory practices existing at Eglin AFB and has failed to discharge his statutory responsibilities with respect to these practices. The Defendant Director has denied these and related allegations to his Answer.

The Court, by Order of January 28, 1977, as modified by Order of November 14, 1978, has certified a class pursuant to Rule 23(b)(2), described as follows:

> All Negroes who were employed as civilians by the Eglin Air Force Base on January 9, 1976, or at any time thereafter, all Negroes who could have filed administrative complaints of discrimination against Eglin Air Force Base on January 9, 1976, or at any time thereafter, and all Negroes who may in the future apply for employment at the Eglin Air Force Base.

The parties have vigorously conducted discovery for over two years following the filing of the initial Complaint. The parties have announced their intention to the Court to attempt resolution of the sub-

stantive issues raised in the Complaint. This judgment reflects the product of their negotiations.

WHEREAS plaintiffs and defendants consent to the entry of this Judgment on the grounds that it will further the objectives of the aforementioned Act, resolve these matters without the time and expense of further litigation, and fully protect the interest of all the defendants' employees and applicants for employment and;

WHEREAS there has been a recent increase in black participation in Eglin's work force as a result of affirmative efforts, and;

WHEREAS plaintiffs and defendants further agree that this Judgment is not premised upon a judicial finding of systemic discrimination against plaintiffs or the class they represent; NOW, THEREFORE, prior to the taking of testimony in the trial of this action and without adjudication of any issue of law or fact herein and upon the consent of the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

SECTION II:

GENERAL PROVISIONS

1. This Court has jurisdiction over the subject matter of this action and of the parties hereto. The Complaint states claims upon which relief may be granted under 42 U.S.C. § 2000e-16, *et seq.*

2. This Court finds that the entry of this Judgment is in the public interest, is in furtherance of the objectives of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, *et seq.*, and protects the rights of all interested class members. The Court further finds that the class has been adequately represented by plaintiffs and their attorneys. The

provisions of this Consent Judgment are not intended to eliminate any prospective rights otherwise available to complainants under Title VII of the Civil Rights Act of 1964 as amended, or any other rights provided by law.

3. The defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are hereby enjoined and restrained from engaging in any act or practice with the purpose or effect of discriminating or retaliating against any named plaintiff or class member on the basis of race and from failing to implement and comply with the enumerated provisions of this Judgment.

4. Defendants shall not engage in or be party to any act, policy or practice which has the purpose of discriminating or retaliating in any manner against any plaintiff, any employee or former employee, or any applicant for employment because he or she has furnished information or participated in any respect in the prosecution of this action, or because he or she has made charges, testified, asserted a claim or participated in any manner in any investigation or proceeding under 42 U.S.C. § 2000e-16, *et seq.*, or any regulations promulgated thereunder.

5. This Judgment is intended to embrace all personnel practices of the Civilian Personnel Office of the Eglin Air Force Base as well as the responsibilities of the Office of Personnel Management with regard to those practices. The provisions of this Judgment are further intended to apply to all personnel practices of the tenant organizations within the Air Force serviced by the Eglin Air Force Base Civilian Personnel Office, including Hurlburt Field.

6. This Judgment shall remain in effect for a period of seven (7) years following entry and approval by the Court during which time the Court will retain jurisdiction to modify or enforce the Judgment. Further, if at the end of the seven (7) year period set forth above, plaintiffs believe that the requirements of the Judgment have not been substantially accomplished, they shall have the right to petition the Court for an Order extending the terms of the Judgment for a specific period of time not to exceed three (3) additional years.

7. The defendants shall ensure black representative(s) on the Civilian Policy Board * and any other manpower or personnel policy making boards having significant responsibility for advising or making determinations with respect to civilian personnel or manpower policy matters.

8. The defendants shall ensure that all occupational qualifications are in conformity with applicable requirements as promulgated by appropriate Federal agencies. Toward this end the defendants specifically commit themselves to imposing a requirement that a candidate for employment as a stenographer be stenographically qualified and that vacant secretarial or clerical positions shall not include or maintain stenography as a mandatory qualification requirement unless the position requires significant (10% or more of the time) stenographic performance on the job.

9. In interpreting the provisions of this Judgment which may become disputed among the parties, the law as set forth by Title VII of the Civil Rights

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* The Civilian Policy Board is a board, appointed pursuant to AFSC Regulation 40-3, dated June 6, 1980, whose function is to advise the local command on civilian personnel matters.

Act of 1964 as construed by the courts, shall apply. Where the phrase "good faith effort" is used in this Judgment all parties recognize this phrase to mean that every necessary and appropriate step will be taken to realize the specified objectives. Where the word "employment" is used herein, it is used to include "re-employment" as well. References to the masculine gender shall include the feminine gender.

SECTION III:

SPECIAL MASTER

1. The parties shall endeavor to agree upon the designation of an individual to serve as a Special Master for the purpose of resolving disputes between the parties under the terms of the Judgment.

2. In the event that the parties cannot agree on the designation of a Special Master and have so notified the Court within thirty (30) days from the entry of this Judgment, the Court shall make such designation. The parties may tender suggestions to the Court for this purpose at the time that the Court is notified that no agreement can be reached.

3. If the Court appoints a Special Master for whom it is appropriate to provide reasonable compensation and expenses, this compensation and expense shall be borne by the defendants, in an amount and in a manner to be determined by the Court.

SECTION IV:

CLASS MEMBER IDENTIFICATION

1. The parties shall make every reasonable effort to identify black persons who have unsuccessfully applied for employment at Eglin AFB from March

24, 1972, to date. In order to be considered for a monetary award, and other relief pursuant to this Judgment the claimant must demonstrate:

a. that he or she is a class member, and

b. that an application for employment at Eglin was made in a manner and under such circumstances as to express an interest in federal employment at the Base, and

c. that because of an expression of continuing interest or through such other circumstances, he or she had sufficient reason to believe that the application was current or active on January 9, 1976, or thereafter, and

d. that he or she was qualified for the position(s) sought.

2. The parties shall make every reasonable effort to identify black persons who would have applied for employment at Eglin AFB between March 24, 1972, and the date of entry and approval of this Judgment. Plaintiffs acknowledge that each claimant shall bear the difficult burden of establishing that he or she had a perception that applying for employment with Eglin would have been a futile act on account of his or her race. In order to be considered for a monetary award, and other relief pursuant to this Judgment, the claimant must successfully establish with credible evidence other than or in addition to his own testimony, that:

a. he would have applied for employment at Eglin; and

b. he possessed the requisite qualifications for the position(s) he would have sought.

It is the further intention of the parties that this determination shall be guided by the language of the Supreme Court in *Teamsters v. U.S.*, 431 U.S. 324 (1978), and related cases.

3. Persons as described in Paragraph 1 and 2 above will be furnished the notice in Attachment A and B respectively[*]

SECTION V:

CLASS MEMBER COMPENSATION

1. For the purpose of establishing a fund for the liquidation of damage claims of class members pursuant to this Section, the defendants shall expeditiously cause to be deposited with the Clerk of this Court the amount of $2,000,000.00. Until such funds have been distributed pursuant to this Judgment, they shall be prudently invested in obligations of adequate security to satisfy the Court. All interest accrued shall be added to the fund to be distributed to the class members.

2. Within sixty (60) days from the date of entry of this Judgment the parties shall give notice to all class members advising them that they may be considered for a damage award under the terms and procedures described below. This notice shall be given directly by mail or telephone where it is practicable to do so, and it shall be given by publication in existing government periodicals and in public media in the Northwest Florida community reasonably calculated to so inform affected class members. This notification shall inform class members of the general terms of this Judgment and it shall specify the date, to be determined by Court Order, by which members seeking to be considered for a damage award must contact the Plaintiffs' Monitoring Committee.

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[* Attachments A and B have not been reprinted.]

3. In order to receive a damage award from the fund established under Paragraph 1, above, each class member seeking such an award shall establish to the satisfaction of the Plaintiffs' Monitoring Committee that:

a. He or she had applied for or attempted to obtain Federal employment at the Eglin complex at any time since January 9, 1974, and that at the time of application or attempted application he or she was qualified for such employment under the standards published in Civil Service Commission Handbook X-118 or X-118C, or that,

b. He or she would have applied for federal employment at the Eglin complex at any time since January 9, 1974, but did not make such an attempt based upon his or her perception of existing discriminatory practices, PROVIDED, however, that class members seeking to establish their entitlement under this sub-section shall be required to supply extrinsic evidence of the fact that they would have so applied for employment, and provided further that they can establish the year in which they would have so applied and that they were qualified for such employment under standards published in Civil Service Commission Handbook X-118 or X-118C.

4. Promptly after the date established by the Court as the deadline for class members to notify the Plaintiffs' Monitoring Committee of their desire to be considered for a damage award, the Plaintiffs' Monitoring Committee shall elicit all necessary information from the class member claimants in order

to make its determinations as to eligibility under the standards described to Paragraph 3, above.

To aid in substantiation of claims set forth herein, defendants shall furnish any relevant documents and evidence in its possession pertaining to each claimant, as requested by the Plaintiffs' Monitoring Committee. Such documents and evidence shall be searched out, assembled and delivered by defendants to the Plaintiffs' Monitoring Committee promptly upon notice to defendants that an individual has presented or intends to present a claim. If no such documents or evidence are in defendants' possession, defendants shall so certify.

5. Following the determination of eligibility by the Plaintiffs' Monitoring Committee, the Committee shall apportion the eligible claimants' damage awards according to the following formula:

a. Class members establishing that they applied or would have applied for employment at Eglin in a Wage Grade or General Schedule Level 1 through 4 position shall be credited one point for each six month calendar period or portion thereof between January 1, 1974, and date of Court approval, following the date of application, during which the class member's actual employment income was less than he would have earned through Eglin employment.

b. Class members establishing that they applied or would have applied for employment at Eglin in a Wage Grade or General Schedule Level 5 through 9 position shall be credited one and one-half points for each six month calendar period or portion thereof between

January 1, 1974, and date of Court approval, following the date of application, during which the class member's actual employment income was less than he would have earned through Eglin employment.

c. Class members establishing that they applied or would have applied for employment at Eglin in a Wage Grade or General Schedule Level 10 or above position shall be credited with two points for each six month calendar period or portion thereof between January 1, 1974, and date of Court approval, following the date of application during which the class member's actual employment income was less than he would have earned through Eglin employment.

4. Those class members who unsuccessfully applied for Eglin employment on more than one occasion will be credited only with the single application which results in the largest allocation of points.

e. After the point allocations described in subsection a, b, c and d have been determined by the Plaintiffs' Monitoring Committee for each class member claimant, each class member's share of the total damage award shall be calculated by dividing that class member's point allocation by the total point allocation for all class members. The formula governing distribution is as follows:

$$\frac{\text{Individual Point Allocation} \times (\$2{,}000{,}000 + \text{Accrued Interest})}{\text{Total of all Class Member Point Allocations}}$$

f. No individual class member shall receive a damage award in excess of $40,000. In the event that the fund established in paragraph 1 above is not exhausted by the distribution formula set forth in this paragraph, any excess not so distributed shall revert to the Government.

6. All calculations described and required by this Section shall be conducted with the advice of Plaintiffs' counsel and shall be certified as accurate by a licensed Certified Public Accountant. Promptly following the certification of accuracy, the Plaintiffs' Monitoring Committee shall provide it, as well as a list of all class members and their corresponding point allocations to the Special Master for his approval. All class members considered by the Committee shall be notified by the Plaintiffs' Monitoring Committee of the final determination of the Committee and they shall be given a period of fourteen (14) days to file any complaints concerning such determinations with the Special Master. The Special Master shall resolve any complaints regarding Committee determinations as quickly as possible.

7. The class members who have received a monetary offer shall then have thirty (30) days after the Special Master's final determination of the amount to be distributed hereunder within which to opt out of this class. Those class members may opt out only for purposes of contesting the amount of monetary damages awarded under this Section. The amount that would have been distributed to those class members who opt out shall revert to the Government. Those who opt may pursue an individual claim only for monetary damages by further proceedings established by the Court in this lawsuit. These proceed-

ings will not provide for individual trials involving issues of discrimination or liability therefor, as those matters are forever settled by the class members and parties to this Consent Judgment. The determination of such greater amount shall be based on the criteria articulated by applicable law. The Court will hold hearings only on the issue of monetary damage awards. Further, if seven (7) or more class members elect to opt out under these provisions, the defendants have the option to vacate this Consent Judgment in its entirety with no obligation to negotiate or confer with plaintiffs or the Court regarding the basis of exercising such option. The defendants shall have thirty (30) days after the expiration of the time for class members to opt out to provide notice of the exercise of their option to vacate this Consent Judgment.

8. The Special Master shall, after the expiration of the time set forth in paragraph 7 above, direct the Clerk of this Court to distribute the fund and all interest accrued to the class members who have not elected to opt out and, if appropriate, the Government, according to this Section.

SECTION VI:

PRIORITY EMPLOYMENT

1. The defendant Air Force shall hire 100 class members at Eglin who have been previously rejected or dissuaded from employment according to the following procedures:

a. The Plaintiffs' Monitoring Committee shall canvass the list of successful class member claimants who received a damage award pur-

suant to Section V, above. The Committee shall prepare a list of names of those class members receiving an award or who would have received an award but elected to opt out of the class to pursue an individual claim for monetary damages whom the Committee finds to be interested in Eglin employment and generally qualified for such employment. A personnel specialist from Eglin will be made available to the Plaintiffs' Monitoring Committee to assist in this process.

b. The Plaintiffs' Monitoring Committee shall transmit the list of names to Eglin for its review of the qualifications of candidates. As promptly as possible, Eglin shall indicate those whom it agrees are generally qualified for Eglin employment.

c. A final list of class members shall be prepared from those whom the Plaintiffs' Monitoring Committee and Eglin have agreed to, including those, if any, whom the Special Master has determined are qualified for Eglin employment. This list shall consist of the class member's name and the General Schedule or Wage Grade series and grade for which he or she has been found to be generally qualified and have indicated a desire for employment under this section. In those instances where more than one class member is found to be qualified for the same position, a panel shall be constituted composed of two (2) representatives of the Plaintiffs' Monitoring Committee and two (2) representatives from Eglin Air Force Base whose duty

it shall be to rank order those class members. Should three (3) members of this panel fail to agree on a rank order of those class members; the rank ordering shall be resolved by the Special Master. Eglin shall then hire from this list according to the ranking except for good cause shown. The Special Master shall resolve all disputes over such selection.

d. All class members who had communicated their desire for Eglin employment to the Plaintiffs' Monitoring Committee shall be given notice by the Plaintiffs' Monitoring Committee of the list prepared under this Section. They shall be given a period of fourteen (14) days following notice to lodge objections as promptly as possible with the Special Master. Following the resolution of such objections by the Special Master, he shall order Eglin to hire from the list as set forth below.

2. Eglin shall offer career, career-conditional, or Career Overage Pending Assignment (COPA) employment to each class member whose name is listed on the list established in Paragraph 1 as vacancies occur in the positions for which they qualify. Notice of the offer shall be given simultaneously to the Plaintiffs' Monitoring Committee. This obligation shall supersede and take priority over any other employment preferences which may exist by law or civil service procedures, PROVIDED, however that this obligation shall terminate upon the occurrence of either of the following conditions:

a. The list of class members is exhausted, or

b. One hundred class members have accepted the employment opportunities tendered. Class members who voluntarily decline an offer of employment shall have their names stricken from the list and shall not be entitled to receive any other offers from that list.

Eglin's goal is to meet this obligation within 18 months of the date of receipt of the final list of class members pursuant to Paragraph 1, above. Should Eglin, having made very good faith effort, fail to meet this goal, an extension of six months may be granted by the Court unless otherwise stipulated to by the parties.

3. Class members shall be required to complete a Standard Form 171 in order for their qualifications to be evaluated. OPM shall assist as may be necessary in the completion of Form 171.

4. Eglin shall transmit to the Plaintiffs' Monitoring Committee, upon the date this Judgment is approved, a listing of all existing vacancies, a projection of anticipated vacancies and the turnover rates for all Eglin jobs.

5. All disputes regarding class member qualifications and job criteria shall be resolved by the Special Master.

SECTION VII:

HIRING GOALS

1. Throughout the life of the Judgment, Eglin shall make every good faith effort to recruit, hire and maintain at a minimum the following racial proportions for the indicated series and occupational categories:

| a. OCCUPATIONAL CATEGORY * | Goal (%) |
|---|---|
| Scientists and Engineers | 3 |
| Other professionals | 6 |
| Technical | 3 |
| Managers and Administrators | 6 |
| Clerical | 7 |
| Craftsman | 6 |
| Operatives | 15 |
| Service Workers | 10 |
| Laborers | 10 |

| b. SERIES | TITLE | Goal (%) |
|---|---|---|
| 312 | Clerk-Stenographer | 7 |
| 318 | Secretary | 7 |
| 332 | Computer Operator | 7 |
| 345 | Program Analyst | 3 |
| 382 | Telephone Operator | 7 |
| 501 | General Accounting Admin. | 7 |
| 802 | Engineering Technician | 3 |
| 856 | Electronics Technican | 4 |
| 861 | Aerospace Engineer | 3 |
| 1020 | Illustrator | 3 |
| 1310 | Physicist | 3 |
| 1520 | Mathematician | 5 |
| 2005 | Supply Clerk and Technician | 8 |
| 2614 | Electronics Mechanic | 6 |
| 4102 | Painter | 6 |
| 5378 | Powered Support Systems Mechanic | 6 |
| 5803 | Heavy Mobile Equipment Mechanic | 6 |
| 6907 | Warehouseman | 16 |
| 7404 | Cook | 15 |
| 7407 | Meatcutter | 15 |
| 6802 | Aircraft Engine Repairer | 7 |
| 8852 | Aircraft Mechanic | 6 |

* These categories contain the specific job series as listed in Attachment C. For purposes of labor market analysis, Attachment C contains the cross-mapping between the specific

2. When detailed occupational data from the 1980 Census of Population becomes available, this data will be used to recalculate all goals set forth in Paragraph 1 above, using the following agreed upon labor markets:

| CATEGORY | |
|---|---|
| Scientists and Engineers | National Civilian Labor Force (CLF) |
| Other Professionals | National CLF |
| Technical | Average of National, Okaloosa County CLF's |
| Managers and Administrators | National CLF |
| Clerical | Average of National, Okaloosa County CLF's |
| Craftsmen | Weighted Average of Okaloosa County (75%) and Escambia County (25%) CLF's |
| Operatives | Okaloosa County CLF |
| Service Workers | Okaloosa County Blue Collar Labor Force * |
| Laborers | Okaloosa County Blue Collar Labor Force |

3. In addition to the agreed upon goals set forth and described in Paragraph 1 and 2 above, Eglin agrees to adopt any higher goals as part of this Consent Judgment which may be imposed upon Eglin by the Equal Employment Opportunity Commission or

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job series and Census occupational categories. Such cross-mapping will be modified, as appropriate, when the 1980 Census data becomes available.

* Blue Collar Labor Force is defined to include all craftsmen, all operatives, service workers excluding household workers, and laborers excluding farm laborers.

other Federal agency, and further agrees to take all steps as may be required by such agencies to meet such goals.

4. At any hearing held before the Court, once it is established by plaintiffs that Eglin has failed to meet the numerical hiring goals specified in this Judgment, defendants shall have the burden to prove by a preponderance of the evidence that:

a. every reasonable effort to recruit and obtain black applicants from available sources had been effectuated, and

b. candidates could not reasonably be made available for selection opportunities.

In this regard, Eglin shall collect and maintain racial information on applicants according to applicable regulations or to the extent possible. Notification requesting such data shall contain, at a minimum, the following:

1) The racial information requested of the applicant is for the purpose of enabling Eglin to plan and monitor its EEO performance.

2) The information shall be maintained by the Eglin EEO Office in strict confidentiality.

3) The information will not be considered or used as a basis for any employment decision except within the context of this agreement.

Proof by Eglin that it hired blacks in proportion to its applicant flow shall not, in itself, be sufficient to meet its burden under this paragraph.

5. In determining whether the defendants have met the goals described in this Section, the following shall apply:

a. Student aides, summer aides, student-trainees (co-ops), temporary VRAs and temporary overhires (except COPAs) shall not be regarded as incumbents for computational purposes.

b. Only career and career-conditional appointments (including permanent excepted, permanent VRA, COPA appointments leading to permanent employment) shall be counted toward the meeting of goals.

c. Eglin shall make every good faith effort to maximize the employment opportunities of black applicants from the Eglin commuting area.

d. Eglin shall be credited with no more than forty (40) percent of the black appointments to Eglin through transfer and reassignment sources, and in order to count toward the meeting of goals, such appointments must remain on the Eglin payroll for a period of 18 months.

e. The goals defined in this section shall remain in effect for the life of the Judgment subject to modification as described in the Judgment. The meeting of a goal does not relieve the defendant of its obligations to continue to meet such a goal for the life of the Judgment.

SECTION VIII:

INSPECTION AND EVALUATION

1. Within 60 days of the date of the Court's approval of this Consent Judgment, the Office of Personnel Management shall conduct an evaluation of

the personnel practices of the Eglin Air Force Base Civilian Personnel Office (CPO). The purpose of this evaluation will be to determine if the personnel practices of the CPO are in conformance with then applicable federal law, regulation and procedure as well as the specific requirements set forth in this Consent Judgment.

The evaluation shall be conducted on site and shall include review of Eglin's recruiting, hiring and promotion practices. A random sampling of employment decisions shall be utilized to profile those practices. At the conclusion of the evaluation, a report detailing the results of the review as well as recommendations for improved operation and correction of deficiencies shall be prepared, a copy of which shall be forwarded to the Plaintiffs' Monitoring Committee, which may submit written comments regarding the report to OPM.

2. Subsequent to the evaluation described in Paragraph 1, above, such evaluation shall be conducted on a periodic basis throughout the life of this Judgment, but not less than once every 18 months.

3. The evaluation described in Paragraph 1, above, shall be in addition to and not in substitution of other audits, assistance visits and evaluations conducted by the Office of Personnel Management in the normal course of its personnel evaluation and staffing responsibilities. OPM will provide copies of all such reports to the Plaintiffs' Monitoring Committee.

4. There shall be established in the Eglin EEO Office a locked receptacle for the receipt of complaints of employees regarding possible violations of applicable personnel laws, rules and regulations. The Plaintiffs' Monitoring Committee shall periodically review the contents of this receptacle and shall log any com-

plaints contained therein. If the Plaintiffs' Monitoring Committee in consultation with plaintiffs' counsel shall determine that one or more complaints warrant the attention of the Special Master as having a bearing upon the obligations or performance of the defendants under this Judgment, the Committee shall so inform the Special Master. If the Special Master concurs in the judgment of the Plaintiffs' Monitoring Committee, he shall refer the matter to the OPM for evaluation pursuant to Paragraph 1, 2 or 3, above.

SECTION IX:

JUDGMENT ENFORCEMENT PROCEDURES

1. The right of employees or applicants for employment to utilize the complaint procedures applicable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Civil Service Reform Act of 1978, 5 U.S.C. § 7121, shall be preserved for actions occurring subsequent to the Court's approval of this Judgment. However, a class member wishing to present a complaint which falls under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the Civil Service Reform Act of 1978, 5 U.S.C. § 7121, or the procedure set forth in Paragraph 4, below, may present the complaint under one but not more than one of these authorities.

2. The Plaintiffs, Fort Walton Beach Branch of the National Association for the Advancement of Colored People and the Progressive Community Improvement Organization herein as class representatives, shall establish a Plaintiffs' Monitoring Committee (of which no more than four (4) members shall be Eglin employees during the 120 day period following Court approval of this Judgment, and no more

than three (3) members shall be Eglin employees thereafter) and by-laws governing the functioning of such Committee for the purpose of informing the class members of the terms of the Judgment, receiving complaints from class members regarding violations of the Judgment, inquiring into such complaints and monitoring the performance of the defendants under the Judgment, and performing their duties under the Monetary Award and Priority Employment and Promotions provisions of this Judgment. The Plaintiffs' Monitoring Committee is authorized to present matters through counsel of its choice in connection with carrying out this Judgment to the Special Master and the Court. The Plaintiffs' Monitoring Committee members employed by Eglin shall be granted necessary and reasonable official time to perform these and all other Judgment functions. Further, the membership of the Plaintiffs' Monitoring Committee shall not include any class member who receives an award under the Class Member Compensation, Priority Employment, or Promotions provisions of this Judgment as set forth in Section V, Section VI, and Section X, Paragraph 2, herein.

3. The Plaintiffs' Monitoring Committee and designated representative of the defendants shall endeavor to meet periodically or as necessary in order to discuss matters of mutual concern arising from the Judgment and to attempt informal resolution of any potential disputes. The Plaintiffs' Monitoring Committee shall have the right to obtain relevant information regarding compliance with this Judgment. The Special Master shall resolve all disputes concerning requested information.

4. All class members wishing to present complaints of Judgment violation shall contact the Plain-

tiffs' Monitoring Committee. The Committee shall inquire into such complaints in the manner described in Paragraph 3, above. If the Committee in consultation with counsel, is of the opinion that the complaint merits presentation before the Special Master, the complaint shall be presented to the Special Master. The Special Master shall have plenary authority to determine the procedures to be used in resolving such complaints by the class members. In the event that the Special Master determines that a violation of the Judgment has occurred, he shall be authorized to order all appropriate relief therefor, including the award of costs and attorney fees. The parties shall have the right to appeal any such decision to the United States District Court for the Northern District of Florida, and all other rights of appeal are preserved.

5. Complaints by an Eglin employee of racial discrimination or retaliation arising between January 9, 1976, and the date of the Judgment approval by the Court, not otherwise timely filed in any administrative or judicial forum as of the date of Judgment approval by the Court, may be presented pursuant to the procedures in Paragraph 4, above, and the defendants hereby waive all defenses of timeliness with respect to such complaints. The adjudication of complaints described in this Paragraph shall be made by the Special Master with the right of review by the District Court, and all further rights of appeal are hereby waived.

6. The Plaintiffs' Monitoring Committee shall notify the defendants' representative in writing of any complaints of discrimination or retaliation arising between January 9, 1976 and the date of Judgment approval within 120 days of Judgment approval

and shall give similar notice of any complaints of Judgment violation after the date of Judgment approval within 60 days of the date of alleged Judgment violation.

7. In resolving complaints, the establishment by the government that a particular personnel action did not violate any rule or regulation shall not constitute a complete defense to the complaint, if, in the opinion of the Special Master, the action complained of was motivated by race or reprisal. The affirmative action commitments of the defendants, as expressed in any rule, regulation, guideline, letter to agencies or affirmative action plan, and the impact of the adverse action complained of on such affirmative action commitments may be considered by the Special Master in resolving complaints.

SECTION X:

## PROMOTIONS, SUPERVISOR POSITIONS AND AWARDS

1. It is the intent of the parties that the rate of promotions, placement in supervisor positions, and awards (including cash awards) for qualified black employees should be increased to reflect their participation in the various occupational categories listed in Section VII, above.

2. Eglin will promote 25 qualified employees selected by the Plaintiffs' Monitoring Committee to the next higher grade. The Plaintiffs' Monitoring Committee will use the following criteria to make its selections:

a. Promotions shall not be to supervisory positions nor to a grade level above the highest

non-supervisory grade level in a series at Eglin.

b. First consideration will be given to those class members who appeared on a promotion certificate and were not selected.

c. Those class members who did not appear on a promotion certificate must have at least two years in grade.

Having satisfied the above criteria, class member employees shall be considered for these promotions by the Plaintiffs' Monitoring Committee according to the following factors:

(1) ranking on promotion certificates

(2) the number of years in grade

(3) the average grade level of white employees in the same series

(4) the number of years at Eglin

(5) the degree of under representation of blacks in the series

(6) relative qualifications

After having prepared its list of 25 employees so designated for a promotion the Committee shall send the list to the Special Master for approval and the Committee shall notify all employee class members of its selections. Class members shall have a period of fourteen (14) days following notice to file objections with the Special Master. The Special Master shall resolve all such objections as promptly as possible. The Special Master shall then direct the defendants to promote the employees on the final list pursuant to this Paragraph.

For the purpose of establishing a fund to compensate class members receiving promotions pursuant to this Paragraph, the defendants shall expeditiously cause to be deposited with the Clerk of this Court the amount of $75,000.00. Until such funds have been distributed pursuant to this Paragraph, they shall be prudently invested in obligations of adequate security to satisfy the Court. All interest accrued shall be added to the fund to be distributed to appropriate class members.

When the Special Master issues his order directing the defendants to promote class members under this Paragraph, he shall further direct the Clerk of this Court to promptly distribute the funds held pursuant to this Paragraph to the class member promotees, on a per capita basis.

3. Eglin shall calculate the total number of first level supervisors and shall separately calculate the total number of higher level supervisors. This calculation shall be made for each six month period during the life of this Judgment. For all supervisory vacancies arising during each six month period during the life of this Judgment, Eglin shall make every good faith effort to fill said positions in proportion to the percentage of blacks in the occupational category wherein the vacancy arises. In addition, Eglin shall make every good faith effort to fill all vacancies arising in supervisory positions at higher levels with black employees at a rate equal to the black percentage of first level supervisors in that occupational category.

4. Eglin shall make every good faith effort to effectuate employee awards, including cash awards, to black employees at a rate equal to the black participation in that occupational category.

SECTION XI:

AFFIRMATIVE ACTION PLACEMENTS

1. In order to enable the defendant Air Force to improve the black participation rate in the work force at Eglin and the Air Force tenants thereof, the following steps will be taken:

a. A non-baccalaureate cooperative program similar to the existing college co-op program will be initiated by Eglin with the Okaloosa-Walton Junior College, Pensacola Junior College, and one trade school in the Ft. Walton area and one trade school in the Pensacola area. Selected students attending these educational institutions in fields for which Eglin provides employment opportunities shall be offered the opportunity to enter into a cooperative work/study program * with Eglin which, upon satisfactory education attainment and satisfactory job performance will provide career-conditional placement with Eglin. The Defendants shall make every good faith effort to maximize the employment opportunities of black participants in the program.

b. Eglin will implement an Upward Mobility Program. Ten (10) percent of all vacancies at grade level nine (9) or above (except in Scientist and Engineer and supervisory posi-

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* The cooperative work/study program described above is intended to allow alternating (full-time work full-time study for alternating periods) or parallel (concurrent work and study for the entire period) approaches to employment in both General Schedule and Wage Grade Series.

tions) shall be set aside for promotion opportunities under the Upward Mobility Program. The defendants shall at their option, either restructure such jobs to allow entry at a grade level below grade level five (5) or reduce the initial entry grade to a grade level below grade level five (5). Special training and instruction should be provided as necessary to enable Upward Mobility employees to progress without competition to the full potential grade level of the position. Eglin shall make every good faith effort to select black persons for at least forty (40) percent of the available Upward Mobility Program positions.

SECTION XII:

REPORTING

1. On a semiannual basis commencing with the Court's approval of this Judgment, Eglin shall file with the Court and the Plaintiffs' Monitoring Committee a report detailing its performance under this Judgment.

2. The semiannual report shall contain, at a minimum, the following information:

a. A listing of all vacancies arising during the previous six month period, listing the schedule, grade level, occupational series and name of each vacancy. Unfilled vacancies shall be so identified. Supervisory vacancies shall be so identified.

b. With respect to each vacancy listed in (a) above, Eglin shall identify which vacancies

were filled through utilization of the Upward Mobility Program.

c. For each vacancy listed, the defendant shall state the name and race of the person selected to fill the vacancy, and the source of the fill shall also be indicated, i.e., promotion from a lower grade, OPM register, college co-op, VRA appointment.

d. The black proportion of the Eglin work force, both overall and by occupational category.

e. The black proportion of the first level supervisory work force.

f. The black proportion of the supervisory work force above the first level of supervision.

g. A printout of all civilian employees at Eglin, arranged by job series and grade level within series, stating the following information for each employee:

i. name

ii. race

iii. type of appointment

iv. service computation date

v. EODAF date

vi. name of job

3. Requests by the Plaintiffs' Monitoring Committee for additional information reasonably necessary to determine compliance with the terms of the Judgment shall be made in writing within forty-five (45) days of the filing of the report described in Paragraphs 1 and 2, above. The information obtained

under this Section shall be used only for Judgment monitoring purposes.

SECTION XIII:

COSTS AND ATTORNEY FEES

1. Although the resolution of this case is being effectuated without trial and without findings entered by the Court with respect to the allegations contained in the pleadings, the defendants acknowledge that the plaintiffs are "prevailing parties" for purposes of entitlement to attorney's fees and costs pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). The defendants shall, therefore, pay to plaintiffs' counsel reasonable attorney's fees for services rendered the plaintiffs' class. Defendants shall also reimburse plaintiffs for the cost and expenses reasonably incurred in their prosecution of this litigation including the expenses reasonably incurred or to be incurred by the Plaintiffs' Monitoring Committee in carrying out its duties under this Judgment. If the parties cannot agree on the sum to be awarded for attorney's fees and costs, the matter shall be referred to the Court for decision.

2. Costs incurred in connection with class notification shall be paid by the Government.

3. In addition to the costs and fees referred to in Paragraph 1 and 2 above, the Fort Walton NAACP and PCIO shall be reimbursed, upon documentation, those funds which they have expended in maintaining this litigation.

SECTION XIV:

MODIFICATIONS

1. Any party may, upon reasonable notice, petition the Court for modification of the terms of this Consent Judgment, and the Court may grant such petition upon a showing of compelling grounds therefor. The party moving for such modification shall bear the burden of proving the existence of such compelling grounds.

2. With respect to the goals contained in this Judgment, if the defendants successfully demonstrates that they have substantially attained such goals for a sufficient period of time but not less than two consecutive years, indicating that the achieved level of black representation has stabilized, they may move the Court for modification of the Judgment to the extent that the obligation to continue affirmative efforts to meet such goals shall be eliminated. In determining whether Eglin has met such goals for the two year period, for purposes of seeking a modification under this Section only, the employees hired pursuant to Section VI (Priority Employment), above, shall not be counted. In the event that such modification is granted by the Court, all other terms and conditions of the Judgment shall remain in effect for the life of the Judgment and such modification shall in no way diminish Eglin's obligation under this Judgment to meet any goals which may be imposed by the Equal Employment Opportunity Commission or other federal agency.

SECTION XV:

GENERAL RELEASE

Approval by the Court of this Judgment shall operate to discharge the defendants from all liability arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, for all acts of racial discrimination occurring on or before the date of Court approval of this Judgment, except for the following:

a. Any liability to a plaintiff or a class member who is pursuing an administrative complaint of racial discrimination as of the date of Court approval of this Judgment shall not be discharged.

b. Any liability to a plaintiff or a class member who pursues his or her rights pursuant to Section IX, Paragraph 4 and 5, above, shall not be discharged until such time as those rights have been finally adjudicated pursuant to this Judgment.

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* * * * *

## ATTACHMENT C [*]

## CENSUS OCCUPATIONAL CODES

### Scientists & Engineers

| Civil Service Job Title | Civil Service Series | Census Occupational Code |
|---|---|---|
| Safety Management | 013 | 013 |
| Program Analyst | 345 | 055 |
| Biologist | 401 | 044 |
| Forestry | 460 | 025 |
| Wildlife Biologist | 486 | 042 |
| Engineer, General | 801 | 023 |
| Engineer, Safety | 803 | 013 |
| Engineer, Material | 806 | 015 |
| Architect | 808 | 002 |
| Engineer, Civil | 810 | 011 |
| Engineer, Sanitary | 819 | 011 |
| Engineer, Mechanical | 830 | 014 |
| Engineer, Electrical | 850 | 012 |
| Engineer, Electronics | 855 | 012 |
| Engineer, Aerospace | 961 | 006 |
| Engineer, Chemical | 893 | 010 |
| Engineer, Industrial | 896 | 013 |
| Physical Scientist | 1301 | 054 |
| Physicist | 1310 | 055 |
| Chemist | 1320 | 045 |
| Meteorologist | 1340 | 045 |
| Operations Research Analyst | 1515 | 055 |
| Mathematician | 1520 | 035 |
| Mathematical Statistician | 1529 | 036 |
| Statistician | 1530 | 036 |

[* Attachments A and B have not been reprinted.]

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Supreme Court, U.S.
FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-177

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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VERNE ORR, SECRETARY OF THE AIR FORCE, ET AL., PETITIONERS

v.

WILLIAM C. TURNER, ET AL., RESPONDENT

---

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

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BEST AVAILABLE COPY

## QUESTIONS PRESENTED

I. Whether this Court should exercise its discretion to decline review of the court of appeals decision holding, inter alia, that Section 706(g) of Title VII Civil Rights Act of 1964, 42 U.S.C. 2000(e)-5(g) does not prevent a court, when enforcing a consent judgment entered in a suit brought under Title VII against a public employer, from awarding back pay and a preferential right to a job to a class member who suffered a Consent Judgment violation, where the Consent Judgment established a special master's power to award "all appropriate relief" for violations of the Judgment and where the special master found that the Consent Judgment and its good faith provisions requiring all necessary and appropriate steps in order to meet the goals established in it had been violated.

II. Whether this Court should exercise its discretion to decline review of the court of appeals decision holding, inter alia, that the due process clause of the Fifth Amendment does not prevent a court, when enforcing a consent judgment entered in a suit brought under Title VII against a public employer, from awarding back pay and a preferential right to a job to a class member who suffered a Consent Judgment violation, where the Consent Judgment established a special master's power to award "all appropriate relief" for violations of the Judgment and where the special master found that the Consent Judgment and its good faith provisions requiring all necessary and appropriate steps in order to meet the goals established in it had been violated.

## PARTIES TO THE PROCEEDING

Respondent, Raymond Little, is satisfied with Petitioners' statement regarding parties to the proceeding below.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

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No.

VERNE ORR, SECRETARY OF THE AIR FORCE, ET AL., PETITIONERS

v.

WILLIAM C. TURNER, ET AL., RESPONDENT

---

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## OPINIONS AND JUDGMENTS BELOW

Respondent is satisfied with Petitioners' statement regarding opinions and judgments below.

## JURISDICTIONAL STATEMENT

Respondent is satisfied with Petitioners' statement.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent is satisfied with the Petitioners' statement regarding the constitutional and statutory provisions involved except to add Section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(b), which provides in pertinent part:

> The Civil Service Commission shall --
>
> (1) Be responsible for the annual review and approval of a national and regional equal opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;. . .
>
> . . .
>
> The plan submitted by each department, agency, and unit shall include, but not be limited to --
>
> (1) provision for the establishment of training and educa-

> tion programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential . . .

## STATEMENT OF THE CASE

The Respondent is satisfied with the Petitioners' statement of the case except to add the following:

(1) Although there was no specific admission of liability of a Title VII violation by the Petitioners in the January 12, 1981 Consent Judgment, the Petitioners did agree to be bound by injunctions enjoining any future violation of Title VII and enjoining Petitioners from failing to implement and comply with the terms of the Judgment. Pet. App.[1/] at 38a, ¶¶3, 4.

(2) Further, although there was no admission of liability, numerous provi-

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[1/] References to the Petitioners' Appendix shall be "Pet. App."

sions of the Consent Judgment clearly establish that blacks were exceedingly underrepresented throughout the Petitioners' workforce and that Petitioners acknowledged this fact and covenanted to rectify the historic racial imbalance. Pet. App. 37a (second full paragraph); Pet. App. 39a, ¶7; Pet. App. 50a-54a (establishing hiring goals, including good faith effort to recruit, hire, and maintain certain racial proportions); Pet. App. 59a--"promotion goals" (including good faith effort to promote blacks according to established proportions); Pet. App. 62a, ¶1, (establishing affirmative action placements and providing that "in order to enable the Defendant Air Force to <u>improve</u> the black participation rate in the workforce at Eglin and the Air Force tenets thereof . . ." (emphasis supplied); Pet. App. 66a, ¶2 (allowing Defendants, prior to expiration of

Judgment, to seek elimination of the goals and affirmative efforts to meet them once goals have been substantially attained for a sufficient period of time). In addition to the above, the racial imbalance in the supervisory level jobs, such as the one in the instant case, at the time the Consent Judgment was approved was manifest. At that time there were only 10 black supervisors out of 497, or 2.05% black in a workforce that was nearly 6% black. Respondent's Exhibits 9, 9a and Attachment 5 to the Petitioners' First Semiannual Report filed pursuant to the Consent Judgment.

(3) Both the Consent Judgment and the goals contained in it are temporary in duration. Pet. App. at 39a, ¶6; 61a, ¶3. Nothing in the Consent Judgment requires the displacement of any white employee. The Consent Judgment does not create an absolute bar to the advancement of white

employees; to the contrary, it has a de minimis effect on the opportunity for white employee advancement given the extremely conservative goals agreed to by the parties. Ibid. The goals established in the Consent Judgment were not intended to maintain racial balance but simply to eliminate a historic imbalance. Pet. App. 59a, ¶1. The goals will end as soon as the percentage of black workers approximates the percentage of blacks in the relevant labor markets. Pet. App. 66a, ¶2. There were no quota obligations established in the Consent Judgment, only goals. Ibid.

(4) Section X of the Consent Judgment required Petitioners to make every "good faith effort" to promote blacks to supervisory positions when the percentage of blacks in those positions was less than a certain fixed ratio. Section II, ¶9 of the Consent Judgment

defined "good faith efforts" as "every necessary and appropriate step will be taken to realize the specified objectives." Pet. App. at 40a. The record before the special master was barren of any effort made by the Petitioners to comply with their covenant to exercise good faith efforts in promoting blacks when a consent judgment goal existed. Pet. App. 8a, 759 F.2d at 822.

(5) Evidence supporting the special master's finding of a consent judgment violation in the manner in which the position at issue was filled was well established at the evidentiary hearing held on this claim.[2/] That evidence included the following:

---

[2/] The Petitioners are wrong in claiming that the special master only found a "technical" violation of the Consent Judgment. Pet. at 17 and n.9. The special master found that the good faith provisions of the Consent Judgment had been violated. The court of appeals (cont.)

a. Documentary and testimonial evidence clearly established Respondent's extensive qualifications for the position at issue. 5 Tr. 90-95, 98; Pet. App. at 7a-8a. These qualifications included an A.A. degree and other continuing education courses, significant supervisory experience in both the U.S. Army and U.S. Army Reserves, and 12 years experience as an air conditioning mechanic including two years as supervisor in this field. Ibid., 5 Tr. 87-92.

b. The selection was made by an all-white selection panel. At the interview conducted by this panel for the job in question, Respondent was not asked any

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2/ (Cont.) reviewed the entire record to determine if this finding was clearly erroneous. See, Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Anderson v. City of Bessemer City, 470 U.S. ____, 105 S.Ct. 1504 (1985). The court of appeals correctly determined that the special master's finding was not clearly erroneous. Pet. App. at 5a-6a.

questions by the selectors about his extensive prior supervisory experience or education. 6 Tr. 234, Pet. App. at 7a. The selection panel did not ask Respondent about his military experience, his vocational training, his air conditioning schooling, nor about his technical air conditioning know-how. 6 Tr. 234-235, Pet. App. 7a. The selection panel reviewed none of Respondent's personnel records prior to the interview or selection. 6 Tr. 236, Pet. App. 7a. Respondent's interview lasted approximately fifteen minutes, while that of the white selectee may have lasted as long as an hour. 6 Tr. 210, 235, Pet. App. 7a. The selecting panel members admitted that at the time they made their selection they were ignorant of Respondent's record and background. 6 Tr. 157, 192, Pet. App. 7a.

c. One selecting official stated that the three factors he looked for in

candidates included the ability to lead, experience in the air conditioning field, and supervisory experience, and in light of that he believed Respondent was not the best qualified candidate for the job. However, on cross-examination, the same supervisor admitted that he was not aware of Respondent's prior supervisory experience and that he had not even reviewed Respondent's personnel records at the time of the selection. 6 Tr. 140-141, 157, 234. This selecting official also claimed that Respondent lacked the requisite mechanical skills to properly perform the job in question yet the performance appraisals prepared by this supervisor for Respondent directly contradicted this statement. R.E.3/ 209, Pet. App. 7a.

d. Another of the selecting supervisors testified that education was one of

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3/ "R.E." refers to the record excerpts filed in the court of appeals.

three key factors in the selection, yet on cross-examination he changed his testimony once it was brought to his attention that the white selectee had less education than Respondent. 6 Tr. 177-178, 194, 196, Pet. App. 7a. This selecting official also admitted on cross-examination that he had not reviewed Respondent's records at the time of the interview nor was he aware of Respondent's supervisory experience. 6 Tr. 197-198. The selecting officials were aware, however, that Respondent would have been the first black to ever hold a supervisory position in the department in question. 6 Tr. 156.4/

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4/ Other corrobative evidence supporting the finding of a consent judgment violation as well as establishing racial animus was elicited from other witnesses at the trial. One personnel office employee testified that the personnel office had made multiple mistakes relating to the Petitioners' failure to implement the Consent Judgment properly. 4 Tr. 74, 88-89. The same official also testified that Petitioners'employees responsible(cont.)

(6) Both the PMC, which presented Respondent's claim to the special master, and Respondent urged the special master and district court to make a finding of intentional discrimination in light of the egregious facts involved in this selection. R. E. at 47-48; 7 Tr. 46-49. The

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4/ (Cont.) for implementing the Consent Judgment made unilateral interpretations of the Consent Judgment, without court approval, which adversely affected class members. 4 Tr. 63-64, 79-80. Furthermore, an EEO investigator at the Eglin Air Force Base testified that the Eglin officials responsible for reviewing individual EEO investigation reports prepared by this investigator pursuant to the Consent Judgment had on numerous occasions altered his investigation reports, changing them to reflect no discrimination when the reports had initially concluded that discrimination existed. 4 Tr. 15-16. This same EEO investigator further testified that one of Petitioners' attorneys (JAG) had told a large group of Eglin supervisors at an employment seminar that they "could lie to the EEO investigators" during EEO investigations, "but don't lie to me." 4 Tr. 13. This testimony went unrebutted. Further, this same EEO investigator appeared to have been himself a victim of unlawful reprisal at Eglin because he had spoken out about discriminatory practices he had uncovered. 4 Tr. 41-43.

special master and the district court felt they did not need to reach this issue, since they found that a Consent Judgment violation had occurred. If this Court were to grant certiorari and reverse the court of appeals, Respondent would be entitled to prove on remand that Petitioners' acts constituted intentional discrimination and/or contempt. See ¶6, pp. 26-32, infra.

(7) There was no bona-fide seniority system in place at Eglin Air Force Base.5/

(8) The Petitioners have never frontally challenged any provisions of the Consent Judgment claiming that they

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5/ Petitioners make an unexplained reference to a "collective bargaining agreement that was not made a part of the record below." Pet. at 17, n.20. Whatever the intention of this inexplicable reference, it is clear that there was no evidence of this at the trial and it was never an issue before the special master, the district court, or the court of appeals.

violate either Title VII or the Fifth Amendment.

(9) No white employee at the Petitioners' facility has ever come forward to object to or intervene in any of the proceedings in this case. This includes: (1) no objection or intervention at the two fairness hearings held before the district court on December 16, 1980 and January 12, 1981; (2) no objection or intervention in the proceedings before the special master concerning Respondent's claim; (3) no objection or intervention before the district court concerning that claim; (4) no objection or intervention before the court of appeals concerning that claim; and (5) no intervention or amicus application before this Court relating to the Petitioners' application for certiorari.

(10) The January 12, 1981 Consent Judgment was substantially modified by

order of the district court on January 25, 1985. Respondent's Appendix at 1a-34a. This modification was jointly requested by the plaintiffs and defendants in the underlying case. The modified Consent Judgment completely eliminated the administrative complaints procedure, including the special master, which had been in effect pursuant to §IX of the January 12, 1981 Consent Judgment. Respondent's Appendix at 6a-7a.

## REASONS FOR DENYING THE WRIT

### I. THE TITLE VII QUESTION

Petitioners rely exclusively upon this Court's decision in Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____ 104 S.Ct. 2576 (1984) in arguing that review of the decision below should be granted. Respondent contends that the

court of appeals did not err in applying this Court's decision in Stotts and, therefore, since no conflict with this Court's decision exists, review should be declined. Further, this Court should exercise its discretion in declining review given the esoteric and unusual fact situation presented through the instant Consent Judgment and the claim arising under it which makes this case an inappropriate vehicle by which to attempt resolution of the issues which Petitioners claim have been raised by the decision below.

(1) The court of appeals correctly held that since there was no §703(h) bona-fide seniority system at issue in the instant case, this Court's decision in Stotts was inapplicable. It is abundantly clear from reading Stotts that the issue "at the heart" of that case was "whether the District Court exceeded its powers in entering an injunction requiring white

employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." Id. 104 S.Ct. at 2585. The court of appeals correctly refused to apply Stotts in the instant case because no bona-fide seniority system was affected by the special master's decision.

(2) The court of appeals also correctly found Stotts inapplicable since no third party rights, such as those in Stotts, were involved here. At no point during the entire proceedings of the underlying litigation which resulted in the entry of the Consent Judgment in this case6/ did any nonclass members come forward to object and/or intervene in the proceedings. There were two fairness hearings held prior to the Consent

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6/ The original lawsuit, Turner v. Marks, PCA 76-175, was filed in 1976.

Judgment being approved on January 12, 1981 and there were no objections filed by nonclass members to its provisions. Further, no nonclass members ever objected or attempted to intervene in any of the proceedings before the special master, the district court, the court of appeals, or this Court concerning the instant claim of Respondent and the relief ordered by the special master.7/

---

7/ Contrary to the Petitioners' assertion, see, Pet. at 13, 20 the special master did "carefully tailor" the relief to redress the violation. Given the fact that the vacancy in question had been filled in violation of the court's order, Respondent would have been fully entitled to request that the white selectee for that position be bumped from it since he was the illegal beneficiary of the Defendants' illegal conduct and therefore had no lawfully vested rights. See, Spagnuolo v. Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983) and Lee v. Macon County Board of Education, 453 F.2d 1104 (5th Cir. 1971). Respondent did not request such relief, nor did the special master choose bumping as the remedy for rectifying the Consent Judgment violation. Thus, contrary to Petitioners' assertion, third party rights, although not lawfully vested, (cont.)

Thus, the court of appeals correctly held that Stotts was inapplicable to the instant litigation based on that ground as as well.[8/]

(3) The court of appeals also correctly found that Stotts was inapplicable to the instant case since the Defendants had agreed to the entry of the Consent Judgment, which was analogous to an employer entering into a voluntary affirmative action plan. In this respect, the court of appeals found that this Court's decision in United Steelworkers v. Weber, 443 U.S. 193 (1979) provided the

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7/ (Cont.) were considered by Respondent in requesting his relief and by the special master and district court in ordering the relief.

8/ Petitioners argued before the court of appeals that the special master's order essentially required "the Secretary hire or promote only class members until the 'goals' are met." The court of appeals correctly determined that this was a "false issue" given the fact that there was "simply no such holding in the special master's report." Pet. App. at 8a.

appropriate guidance for construing the Consent Judgment. Pet. App. at 13a-17a. The court of appeals was totally correct in adopting this analysis, for had it adopted Petitioners' arguments, it would have required the sub silentio overruling of this Court's decision in Weber. As the following discussion demonstrates, the reasons for the correctness of this ruling are manifest, given the nature of the Consent Judgment and the facts in the instant case.

First, the goals contained in the Consent Judgment were extremely modest and of limited duration. Weber, 443 U.S. at 492. The Consent Judgment did not create an absolute bar to the advancement of white employees. To the contrary, given the de minimis nature of the goals, white employees still enjoyed almost totally unfettered employment opportunities.

Second, there was no quota or absolute preference for blacks established in the Consent Judgment. And when the goals in the instant case are compared to the quota obligations approved by this Court in Weber, the correctness of the court of appeals' decision is obvious. In Weber, the affirmative action plan required a 50/50 selection rate until the historic racial imbalance was corrected. The instant Consent Judgment, first, requires no such quota selections, and second, it establishes goals that in some categories, such as the supervisory ranks, requires the Defendants to raise their black percentage to only approximately six percent (6%) black.

Given these facts, the court of appeals was perfectly correct in following this Court's decision in Weber and not doing what Petitioners now suggest (albeit sub silentio) that this Court

should do; i.e. overrule or emasculate Weber.

(4) The Petitioners state at p. 12 of their Petition that the court of appeals construction in this case of "the term 'all appropriate relief' which is surely found in most, if not all, consent judgments . . . " makes this case significant. Respondent suggests this is not the case given the uniqueness of the instant Consent Judgment. Petitioners do not explain or describe that §IX of the January 12, 1981 Consent Judgment in which the language "all appropriate relief" arises is in the context of a very detailed and complex enforcement mechanism which had been agreed to by the parties at the time the Judgment was approved. See Pet. App. at 56a-59a. This provision is extremely unique to the instant Consent Judgment since this enforcement mechanism was intended to replace the normal EEO

administrative process at the Eglin Air Force Base.9/ The parties intended that this complaint mechanism would replace the old EEO administrative process and provide a speedy mechanism by which class members could receive full and prompt relief from the special master for meritorious grievances. See transcript of January 12, 1981 fairness hearing at 15-16, Doc. #318.

Given the complex nature of the instant Consent Judgment, it was perfectly

---

9/ The uniqueness of this provision is best illustrated by the fact that this entire section (§IX) of the January 12, 1981 Consent Judgment was eliminated by the parties when they modified the Consent Judgment through order of the district court on January 25, 1985. Petitioners failed to inform the Court of this fact in their Petition. See, Respondent's Appendix at 6a-7a.

Thus, it is evident that this issue, i.e. the implementation of the relief in the instant Consent Judgment through the special master created (and abolished) by the parties cannot arise again in the future in this case. Further, it is highly unlikely that such a mechanism, given its uniqueness to the Eglin Air Force Base, would ever arise again in any other case.

reasonable for the parties to have agreed that the special master, who would oversee the implementation of the agreement, should be empowered to fully resolve any disputes which arose under it. This enforcement mechanism is precisely what the Petitioners agreed to when they consented to the entry of this Order on January 12, 1981. The court of appeals did not err in finding that this agreement was enforceable and that the relief determined appropriate by the special master was fully and legally authorized to be awarded in the event of a consent judgment violation; especially one as egregious as that in the instant case. This does not conflict with Stotts, since Stotts did not address this issue. This does, however, fully comport with this Court's decision in Weber, since it is obvious that had the company and/or union in Weber refused to abide by the affirmative action plan

adopted there, the plaintiffs could have sued to enforce and remedy any violation of it. It is axiomatic that for every wrong there must be a remedy. The special master in the instant case simply applied that principle to the parties' agreement.

(5) Petitioners contend that the court of appeals erred in holding that the special master was entitled to order the relief he did. Petitioners again rely upon this Court's decision in Stotts to support their argument. Again, the court of appeals was correct in rejecting the Petitioners' construction of Stotts, since the specific provisions of the Consent Judgment involved in the instant case drew into question the parties' agreement as to what the special master was entitled to award if a consent judgment violation were found and did not involve the factual setting of Stotts, i.e. no violation of consent decree found. The court of

appeals correctly found that Stotts dealt with Title VII violations and not consent judgment violations.10/

(6) Petitioners further claim that the court of appeals erred in treating the special master's order implementing and construing the Consent Judgment in a way different from the modification order entered by the district court in Stotts. Petitioners again rely upon §706(g) for their assertion. The fallacy in the Peti-

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10/ Another basis exists for approving the relief awarded by the special master, altogether apart from that relied upon by the court of appeals. The Government concedes that make whole relief under 706(g) is available for victims of intentional discrimination. A fortiori, the same type relief should be available to a victim of a violation of a consent judgment which was entered into by the parties with the express intent of rectifying past racial imbalances. It is not surprising that the plain language of Title VII does not address the question of how a court should treat victims of such consent judgment violations. Respondent knows of no remedial statute that sets out remedies for violations of remedial orders. But that does not make victims of consent judgment violations any(cont.)

tioners' assertion, in addition to that described above, is demonstrated by examining another alternative basis which the special master and the district court could have used for providing the same relief which Respondent received. That basis stems from the inherent power of a district court to enforce its orders through contempt.

The instant Consent Judgment enjoined the Petitioners ". . . from failing to implement and comply with the enumerated provisions of this Judgment." Pet. App. at 38a, ¶3. It is clear from a review of the facts in the instant case, that Respondent could have instituted contempt proceedings against Petitioners for their "fail[ure] to implement and comply with the enumerated provisions of [the]

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10/ (Cont.) less entitled to full relief. The fact remains that Respondent in the instant case was a victim.

Judgment." Respondent chose not to bring such proceedings, instead relying upon the procedures provided for rectifying Consent Judgment violations as set out in §IX of the Consent Judgment. The course of action chosen by the Respondent was perfectly reasonable under the circumstances since §IX of the Consent Judgment empowered the special master to award "all appropriate relief" in the event a consent judgment violation was found. Thus Respondent was not only not required to prove intentional discrimination in order to receive appropriate relief, but he was also not required to institute contempt proceedings in order to obtain that same relief.11/ See, United States v. United

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11/ Had the special master found intentional discrimination, which Respondent contends he was clearly entitled to do given the instant facts, Petitioners would have no ground for filing their Certiorari Petition. The same holds true for a finding of contempt. (cont.)

Mine Workers of America, 330 U.S. 258, 303-4 (1947); McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443-44 (1911); Hutto v. Finney, 437 U.S. 678, 691 (1978).

The correctness of the procedure

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11/ (Cont.) It is ironic that the position taken by the Petitioners in this case will force Respondent, assuming that this Court were to grant certiorari and reverse the court of appeals, to seek on remand not only a finding of intentional discrimination, thereby eliminating the Petitioners' 706(g) arguments, but also a contempt citation, which would provide a third alternative basis for providing the relief the special master awarded. It is extremely difficult to imagine that the parties, when they negotiated the Consent Judgment, envisioned that class members seeking to have Consent Judgment violations remedied would be required to have the Secretary of the Air Force held in contempt of court in order to receive "appropriate relief." To the contrary, all indications in the record and in the Consent Judgment indicate that the parties intended that the procedures established through §IX would provide a swift and efficient mechanism for fully rectifying Judgment violations, without the necessity of class members proving either intentional discrimination or contempt.

outlined above is manifest in light of the fact that court orders, including those consented to by parties, must be obeyed. If they are not obeyed, then a party aggrieved by such disobedience must have a means by which to rectify such non-compliance. The Stotts case is a good example of this. This Court did not even hint in Stotts that the underlying goal obligations in that case, which required black selection rates of 50% for hiring and 20% for promotion, were illegal. Respondent suggests that had the defendants in Stotts refused to comply with those goal obligations, plaintiffs in that case would have been fully justified in moving the court to have the defendants held in contempt for such disobedience. Had such occurred, those class members aggrieved by the contemptible actions would have been fully entitled to be made whole for the injury suffered per black

letter contempt law. See, United Mine Workers of America, supra, McComb, supra, Gompers, supra, Hutto, supra. Thus, Petitioners' attempted extension of this Court's holding in Stotts relating to the 706(g) issue distorts not only the remedial provisions under Title VII but also those available pursuant to traditional standards of contempt law.

Were the Petitioners' argument accepted by this Court, it would mean that district courts would have had a portion of their traditional enforcement powers (i.e. contempt) diminished by Congress' passage of Title VII; passage of which was clearly intended to grant more not less powers to those courts.12/ It is

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12/ Petitioners' suggestion raises significant constitutional issues as well, foremost of which is whether Congress could constitutionally limit or remove the inherent powers of an Article III Court to fully enforce its orders. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

difficult to imagine a result less consistent with the intent of Congress which passed this law "triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long.'" Weber, 443 U.S. at 204, quoting 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey). Petitioners' suggestion is totally inconsistent with both Congress' intent in passing Title VII and this Court's construction and implementation of it.

(7) Another reason for denying the writ is found in §717 of Title VII.13/ Congress applied unique affirmative action obligations to the Federal Government through §717 when it made Title VII applicable to federal employers in 1972. Specifically, that section of the act

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13/ The court of appeals did not reach this issue. Pet. App. at 12a, n.2.

recognized Congress' concern that minorities had been relegated to lower paying jobs in tne federal service. Section 717(b) was enacted to rectify that historic racial imbalance. Therefore, Congress could not have intended that §706(g) limit federal employer affirmative action.

## II. THE FIFTH AMENDMENT QUESTION

The special master's order fully comports with governing principles of equal protection and operates well within the bounds of permissible remedial action. Despite the Petitioners' assertions to the contrary, the ordered promotion of the Respondent to an unfilled vacancy following a Judgment violation is authorized by the Consent Judgment and does not unlawfully impinge upon any third party rights. Neither the facts of this case nor the controlling law support the Peti-

tioners' assertion that the November 28 Order raises a substantial question under the Fifth Amendment Due Process Clause.

First, Petitioners allege that the master's order has deprived innocent third parties of equal protection under the law. Second, they allege that any voluntary race conscious remedial action that benefits protected class members who have not individually proved themselves to be actual victims of illegal discrimination, violates the Fifth Amendment Due Process Clause, as that provision applies to the concept of equal protection.

The Petitioners' assertion regarding innocent third party rights merits little discussion. The master ordered that the Respondent be placed in an unfilled vacancy. The Petitioners have not shown that any third party sought to fill or was promised the vacancy. The master chose to place the Respondent in a vacant position

even though the illegal beneficiary of the Petitioners' Judgment violation could have been bumped. None of the third parties allegedly harmed by the Respondent's placement in the unfilled vacancy has ever complained or objected despite ample opportunity to do so. Considering that the Petitioners have failed to identify even one "innocent third party" who has been aggrieved or even mildly upset by the master's order, the issue of third party rights is simply not before the Court. The facts of this case do not yield any Fifth Amendment question regarding third party rights.

More disturbing than their assertion of third party rights is the Petitioners' challenge to the legitimacy of voluntary race conscious efforts to remedy the historic racial imbalance at Eglin. Ignoring the wisdom and practicality of encouraging parties to enter into consent decrees, the

Petitioners assert that any voluntary race conscious remedial action by a public employer is constitutionally prohibited.

The Petitioners' position conflicts with this Court's decisions upholding the legitimacy of reasonable race conscious remedies. United Steel Workers of America v. Weber, 443 U.S. 193 (1979); Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980); United Jewish Organizations of Williamsburgh v. Carey, 434 U.S. 144 (1977); McDaniel v. Barresi, 402 U.S. 39 (1971).

It is true that the Consent Judgment in issue does not contain a finding that Petitioners ever engaged in a pattern or practice of illegal discrimination. Such findings are rarely found in Title VII consent judgments. They are rare due to the nature and purpose of consent decrees. A consent judgment allows plaintiffs and

defendants in discrimination suits the opportunity to avoid costly and time consuming litigation while at the same time enabling them to obtain a judicial order which remedies the effects of past discrimination and insures future lawful conduct by the defendant. Likewise, entering into a consent judgment allows a defendant to remedy its wrongful behavior while avoiding the full liability for back pay, reinstatement, competitive seniority etc. that a judicial finding of discrimination would entail. As this Court recognized in Bakke, supra:

> [T]he requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self defeating. Such a requirement would severly undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law.

Id. at 364.

The remedial action embodied in both the master's November 28 Order and in the Consent Judgment in general, is less than the voluntary race conscious affirmative action this Court has previously upheld. In Weber, supra, this Court upheld the validity of a voluntary race conscious affirmative action program against a challenge that it was prohibited by Title VII. The program upheld in Weber granted an absolute preference to blacks for 50% of the positions available in a worker training program. The Consent Judgment at issue here involves no absolute preference. Likewise, contrary to Petitioners' assertion, the Respondent in this case was not awarded a promotion simply because of his membership in the plaintiff class; he was promoted because of his status as a victim of a consent judgment violation.

This Court expressly approved the use

of voluntary race conscious remedial action in Weber. See also, Bakke, Fullilove, Carey, and McDaniel, supra. Attempting to distinguish Weber, Petitioners would have this Court hold that the voluntary race conscious remedial action embodied in this Consent Judgment violates the Fifth Amendment because this Judgment addresses a public as opposed to a private employer.

Adoption of Petitioners' position on remedial action would require this Court to either overrule Weber or rule that Title VII allows a private employer to engage in discriminatory remedial action which if engaged in by the government would violate the principles of equal protection embodied in the Constitution. This case merits no such ruling.

## CONCLUSION

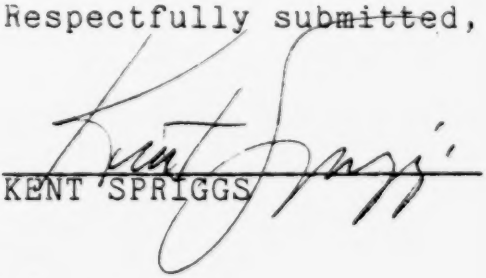
As shown by the foregoing, this case

does not warrant review by this Court. It involves only a single individual wnose action arose through an extremely unique Consent Judgment enforcement mechanism, which has subsequently been eliminated.

Further, assuming this Court were to grant review and reverse the court of appeals, the litigation would not end, since Respondent would be entitled on remand to seek a finding of intentional discrimination and/or contempt, which would provide him the same relief currently at issue.

Wherefore, this Court should enter an order denying the Petition for Writ of Certiorari.

Respectfully submitted,



KENT SPRIGGS

SPRIGGS & WARREN, P.A.
117 S. Martin Luther King
Jr. Boulevard
Tallahassee, FL 32301

## CERTIFICATE OF SERVICE

This is to certify that in accordance with Rule 28 of the Rules of the Supreme Court, I have on this day served the required three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by depositing same in a United States mail box with First-Class postage prepaid and addressed to the following attorney for Petitioners:

Solicitor General
Department of Justice
Washington, D.C. 20530

This 26th day of September, 1985.

KENT SPRIGGS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

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PCA 76-175

WILLIAM C. TURNER, ET AL., PLAINTIFFS

vs.

SECRETARY OF THE AIR FORCE,
ET AL., DEFENDANTS

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MODIFICATIONS TO THE CONSENT JUDGMENT
IN SUBCLASS A

Section 1:

A. This case arose under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16, and was brought against the Secretary of the Air Force and the Chairman of the Civil Service Commission (now Director, United States Office of Personnel Management). The plaintiffs in this case are the Ft.

Walton Beach Branch of the National Association for the Advancement of Colored People, the Progressive Community Improvement Organization, and individual black employees of, and applicants for employment at, Eglin Air Force Base. Plaintiffs filed an administrative complaint in May 1976. On November 10, 1976, the plaintiffs filed their judicial complaint with the District Court. The complaint alleged the existence of a pattern and practice of racial discrimination against black employees and applicants for employment at Eglin Air Force Base. The defendants denied the material allegations of the complaint. On January 28, 1977 the Court certified the following class:

> . . . all Negroes currently employed as civilians by the Air Force and its contractors at Eglin Air Force Base, all Negroes who have previously applied for civilian employment at Eglin Air Force Base and all

> Negroes who will in the future apply for employment at Eglin Air Force Base.

On November 14, 1978, the Court modified its previous class certification to define the class as follows:

> All Negroes who were employed as civilians by the Eglin Air Force Base on January 9, 1976, or at the time thereafter; all Negroes who could have filed administrative complaints of racial discrimination against Eglin Air Force Base on January 9, 1976, or at anytime thereafter; and all Negroes who may, in the future apply for employment at Eglin Air Force Base.

On January 12, 1981, upon the stipulation and agreement of the parties, the Court approved and entered a Consent Judgment purportedly resolving the litigation. As a result of a motion filed by plaintiffs after the entry of the 1981 Consent Judgment, the Court determined that the 1981 Consent Judgment did not resolve all of the claims against the

defendants, as employees paid from nonappropriated funds had not been considered in the negotiations leading to the entry of the 1981 Consent Judgment. Thus by order of March 31, 1982, the Court established a provisional Nonappropriated Fund Subclass "B," which was defined to include:

> Class members who were, are, or may be non-appropriated fund employees or applicants in accordance with the court's previous general certification of the class.

The remaining subclass, which was covered by the 1981 Consent Judgment, is Subclass "A". This subclass is defined as:

> "All Negroes who were employed as civilians in appropriated fund positions by the Eglin Air Force Base on January 9, 1976, or at any time thereafter; all Negroes who could have filed administrative complaints of racial discrimination against Eglin Air Force Base concerning appropriated fund employment or positions and all Negroes who may, in the future, apply for employment for appropriated

> fund positions at Eglin Air Force Base."

The certification was redefined on October 2, 1984 as follows:

> The plaintiffs' class overall is composed of all blacks who are members of either Subclass A or Subclass B as those subclasses are hereafter defined. . . .
>
> Subclass A consists of all blacks who were or will be employed in civil service positions serviced by Eglin Central Civilian Personnel office at Eglin Air Force Base or Hurlburt Field or who applied or will apply for employment for any such position or who as blacks holding such civil service positions have filed or could file administrative complaints of racial discrimination or retaliation against Eglin Air Force Base or Hurlburt Field and with the blacks included in Subclass A limited to those employed or applying for employment or having the right to file such administrative complaints of racial discrimination or retaliation on or after January 9, 1976 and during the life of the consent judgment.

It is to Subclass A and only Subclass A that the modifications, which are detailed

below, apply.

B. The plaintiffs and defendants intended by the entry of the 1981 Consent Judgment to resolve the issues underlying the complaint in a manner which would expedite the bargained for relief to class members without the time and expense of further litigation and fully protect the interests of all the defendants' employees and applicants for employment. The parties agree that the 1981 Consent Judgment has not fully accomplished the purposes for which it was entered into. Therefore, under the provisions of Section XIV the parties agree that the 1981 Consent Judgment must be modified as to Sections I, II, III, IV, VIII, IX,*/ XII, XIII and XV. The modifications contained herein supercede the provisions in the

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*/ The PMC is left in existence for the limited purpose and time for carrying out the duties to terminate the PMC as stipulated by the parties.

1981 Consent Judgment listed above which are eliminated in their entirety, except as provided below. These modifications do not modify nor address the goals and other provisions contained in Sections II, paragraphs 5 and 9; V, VI, VII; X; XI; and XIV, except where specifically identified below. The provisions of Sections V, VI, and Section X paragraph 2 shall expire by their own terms and shall have no further effect when the provisions have been completed.

C. The following Order modifying part of the 1981 Consent Judgment is issued with consent of the parties without any admission by the defendants of any racial discrimination or findings or conclusions by the Court of any violation of the Civil Rights Act of 1964, as amended, against plaintiffs or the class they represent. The Consent Judgment in Subclass A, including the modifications

herein, shall not be admissible as evidence of any past, present, or future racial discrimination by the defendants.

Therefore, it is hereby ordered, adjudged and decreed as follows:

Section 2:

GENERAL PROVISIONS

A. This Court has jurisdiction over the subject matter of this action and of the parties hereto. The Complaint states claims upon which relief may be granted under 42 U.S.C. §2000e-16, et seq.

B. This Court finds that entry of the modifications to the Consent Judgment in Subclass A is in the public interest, is in furtherance of the objectives of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, et seq., and protects the rights of all interested subclass members. The provisions detailed below are not intended to eliminate any prospective rights otherwise available to subclass

members under Title VII of the Civil Rights Act of 1964, as amended, or any other rights provided by law.

C. The Consent Judgment in Subclass A, including the modifications herein, shall remain in effect until January 11, 1988.

D. This Order modifying the Consent Judgment in Subclass A, does not address payment of costs and attorneys' fees arising out of this litigation.

E. If the defendants vacate the Subclass B, Nonappropriated Fund Class Member Consent Judgment pursuant to Section I, paragraph 4 of the nonappropriated fund Consent Judgment, the modifications of the Consent Judgment in Subclass A are also vacated in their entirety and the Consent Judgment in Subclass A remains in effect and unmodified. If the District Court or the Court of Appeals refuses to approve or affirm the approval of the

Subclass B, Nonappropriated Fund Class Member Consent Judgment, plaintiffs or defendants separately at their option without consent of the other party or the Court may vacate modifications contained herein to the Consent Judgment within 30 days of the District Court or appellate court decision.

F. The unaccomplished provisions of Section V of the 1981 Consent Judgment, Class Member Compensation, shall remain in effect until the remaining portion of the class member compensation fund plus interest is distributed to the class members. The unaccomplished provisions of Section VI of the 1981 Consent Judgment, Priority Employment, shall remain in effect until the list of class members is exhausted or one hundred class members have accepted the employment opportunities.

G. The terms and provisions con-

tained in this modification of the Consent Judgment in Subclass A constitute the entire agreement between the parties and shall supercede all previous communications, representations, or agreements, either verbal or written, between the parties herein.

H. The defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are hereby enjoined and restrained from engaging in any act or practice with the purpose or effect of discrimination or retaliating against any named plaintiff or class member on the basis of race and from failing to implement and comply with the enumerated provisions of this Judgment.

I. Defendants shall not, engage in or be a party to any act, policy or practice

which has the purpose of discriminating or retaliating in any manner against any plaintiff; any employee or former employee, or any applicant for employment because he or she has furnished information or participated in any respect in the prosecution of this action, or because he or she has made charges, testified, asserted a claim or participated in any investigation or proceeding under 42 U.S.C. §2000e-16, et seq., or any regulations promulgated thereunder.

J. The defendant, Secretary of the Air Force, shall ensure black representative(s) on the Civilian Policy Board and and any other manpower or personnel policy making boards at Eglin Air Force Base having significant responsibility for advising or making determinations with respect to civilian personnel or manpower policy matters.

Section 3:

PROVISION FOR RELIEF TO PERSONS WITH PENDING COMPLAINTS

A. Subclass members who have previously filed complaints of discrimination or Consent Judgment violation pursuant to Section IX, paragraphs 4 and 5 of the 1981 Consent Judgment which were received by defendants prior to February 13, 1984 will receive the following prospective relief: 20 promotions, one placement in an upward mobility position, 8 within-grade step increases, 4 adjustments to federal retirement benefits, $465,000, and non-monetary relief as described in Appendix 1. Promotions, placement in upward mobility position, adjustments to federal retirement benefits, and within grade step increases will be effective the first full pay period after the expiration of 79 days following the approval of the modification of the Consent Judgment in Subclass A by

the Court. Defendants will take action to cause the payment of money or to deposit the appropriate amounts into the retirement accounts of those who are to receive adjustments to federal retirement benefits after the expiration of 79 days following the approval of the modification of the Consent Judgment in Subclass A by the Court. No individual listed in Appendix 1 has received a promotion or other relief that is in excess of that which could be awarded on their pending claims.

B. The individuals listed in Appendix 2 whose complaints were presented to the Special Master for determination are not eligible to receive any relief for claims thus presented pursuant to this modification of the Consent Judgment in Subclass A. Those individuals listed in Appendix 2 who have pending claims in addition to those presented to the Special Master may be eligible for relief provided

for in Appendix 1 but only to the extent of their unpresented claims. The claims of those persons listed in Appendix 2 which were presented to the Special Master will proceed to determination as if this modification of the Consent Judgment in Subclass A had never been adopted.

C. No individual who had his or her claim withdrawn, settled or otherwise determined pursuant to the 1981 Consent Judgment is eligible to receive from this modification to the Consent Judgment in Subclass A any relief set forth in Appendix 1 for the claim that has been withdrawn, settled, or otherwise determined.

Section 4:

INSPECTION AND EVALUATION

A. The Office of Personnel Management shall conduct an evaluation of the personnel practices of the Eglin Air Force Base Civilian Personnel Office (CPO) once

every eighteen (18) months until January 11, 1988. The purpose of this evaluation will be to determine if the personnel practices of the CPO are in conformance with then applicable federal law, regulation, and procedure as well as the specific requirements set forth in this modification of the Consent Judgment in Subclass A.

The evaluation shall be conducted on site and shall include a review of Eglin's recruiting, hiring, and promotion practices. A random sampling of employment decisions shall be utilized to profile those practies. At the conclusion of the evaluation, a report detailing the results of the review as well as recommendations for improved operation and correction of deficiencies, if any, shall be prepared, a copy of which shall be forwarded to Plaintiffs' Counsel, who may submit written comments regarding the report to OPM.

B. The evaluation described in paragraph A, above, shall be in addition to and not in substitution of other audits, assistance visits, and evaluations conducted by the Office of Personnel Management in the normal course of its personnel evaluation and staffing responsibilities. OPM will provide copies of all such reports to Plaintiffs' Counsel.

Section 5:

REPORTING

A. On a semiannual basis commencing with the Court's approval of this modification of the Consent Judgment in Subclass A, Eglin shall file with the Court a report detailing its performance under the Consent Judgment in Subclass A, including the modifications contained herein.

B. The semiannual report shall contain, at a minimum, the following information:

1. A listing of all vacancies arising

during the previous six month period, listing the schedule, grade level, occupational series and name of each vacancy. Unfilled vacancies shall be so identified. Supervisory vacancies shall be so identified.

2. With respect to each vacancy listed in (1) above, Eglin shall identify which vacancies were filled through utilization of the Upward Mobility Program.

3. For each vacancy listed, the defendant shall state the name and race of the person selected to fill the vacancy, and the source of the fill shall also be indicated, i.e., promotion from a lower grade, OPM register, college co-op, Veterans Readjustment Act (VRA) appointment, etc.

4. The black proportion of the Eglin work force, both overall and by occupational category.

5. The black proportion of the first

level supervisory work force.

6. The black proportion of the supervisory work force above the first level of supervision.

7. A printout of all civilian employees at Eglin, arranged by job series and grade level within series, stating the following information for each employee:

i. name
ii. race
iii. type of appointment
iv. service computation date
v. entry on duty with Air Force (EODAF) date
vi. name of job

Section 6:

ALTERNATE COMPLAINTS PROCEDURE

A. Any subclass member who believes that he or she has been discriminated or retaliated against on the basis of race by actions of personnel at Eglin Air Force Base or Hurlburt Field may file a complaint with the Eglin Discrimination Complaints Office requesting that it be processed in accordance with the terms of

this Section. In accordance with the applicable provisions of 29 C.F.R. §1613.214, the complaint must be signed by the complainant and filed in writing with the Eglin Discrimination Complaints Office within 30 calendar days of the matter causing the complainant to believe that he or she had been discriminated against or, if a personnel action, within 30 calendar days of its effective date. The complaint is deemed filed on the date it is postmarked or, if there is no postmark, on the date it is received by the Discrimination Complaints Office.

B. The complaint must specifically detail the matter complained of, to include any facts known to the complainant. A complaint to be processed through this complaints procedure must be: reasonably specific; timely; based on complainant's race; not duplicative of matters in a previous complaint filed by the same com-

plainant and which has been adjudicated or is still in process; or not duplicative of matters in a previous grievance filed in writing by the same complainant under a negotiated grievance procedure.

C. Upon receipt of a complaint, the Discrimination Complaints Office shall notify the complainant in writing of its receipt. If the complaint meets the criteria set forth in paragraphs A and B above, the Discrimination Complaints Office will investigate the allegations of the complaint and within 90 calendar days will forward a report to the complainant. The report will contain a description of the complaint and a factual analysis of the circumstances surrounding the complaint. The 90 day time limit may be extended only upon the express written agreement of the complainant and the Discrimination Complaints Office. Nothing in this Section precludes the settlement or

informal resolution of the complaint at any time.

D. Within 15 calendar days after receipt of the report from the Discrimination Complaints Office, or within 30 days after receipt of the documents enumerated below in a - g, whichever is later, the complainant may supplement the report and must notify defendants of intent to proceed to the neutral third party. In supplementing the report the complainant is not entitled to compulsory discovery of any information from the defendants. However, within 45 days of the filing of a complaint, the defendants will provide to the complainant with respect to each fill action specifically complained of by the complainant, the following documents:

a. the career brief or Standard Form 171 of the complainant, if available;

b. the career brief or Standard Form 171 of the selectee, if available;

c. the position description concerning the position;

d. the Standard Form 52 concerning the fill action;

e. the Air Force Systems Command Form 134 concerning the fill action.

f. The following material from the PPRS computer printout will be provided:

1. Initial screening factors

2. Basic eligibility factors

3. The number of candidates considered, number of PPRS briefs generated, and where pertinent, indication of whether applicant supply, CAO, Command and Mainstream were considered and,

4. Selection statistics

g. the race of the selectee

These documents are the only documents that are required to be provided to the complainants. This section is not intended to provide, nor indicate, that the defendants are obligated to provide

any other documents to any complainant. Within 3 days after receipt of the complainant's supplementation, if any, or notice by complainant of desire to involve one of the neutral third parties, defendants shall forward a package of information to the appropriate neutral third party. The package of information shall consist of: a) the complaint; b) the defendants' report; c) the complainant's supplementation, if any. The identification of the appropriate neutral third party shall be obtained by defendants from a sequential list maintained in the Office of the Clerk of the District Court for the Northern District of Florida.

E. The complaints shall be referred to one of the three neutral parties identified in Appendix 3 in sequence. These neutral parties are not appointed pursuant to Rule 53 F.R.Civ.P. The neutral parties shall be compensated by the defendants.

If, for any reason, one or more of the neutral third parties is unable to continue serving, any replacement(s) shall be selected by mutual agreement of the plaintiffs' and defendants' counsel.

F. (1) Within 21 calendar days of receipt of the report and supplementation, if any, the neutral party shall make a decision based solely on the report and supplementation, if any. It is the intent of the parties that the neutral third party will seek, if appropriate, to mediate the dispute between the complainant and the defendants before rendering a decision which shall be based solely on the report, and supplementation, if any. The neutral party shall have no authority to call witnesses, hold any type of hearing or request information from the defendant or complainant.

(2) The parties have 30 calendar days from receipt of the decision of the

neutral third party to object to such decision. If neither party objects within 30 calendar days, the decision shall be binding on both parties.

If either party objects to the decision of the neutral third party such decision is void. In such event the complainant may pursue his or her claim but shall do so in this lawsuit.

(3) If any time limit, other than the time limit for filing or supplementing a complaint is not met, the complainant may immediately file a complaint in this lawsuit before the District Court as if the complainant has exhausted complainant's administrative remedies. Such complaint must be filed within 204 days of the filing of the initial administrative complaint.

The neutral third party shall be paid $75.00 per hour by defendants for all reasonable hours expended for work con-

cerning any individual complaint. If a complainant prevails in accordance with Title VII standards before the neutral third party and the decision becomes binding, the defendants will pay reasonble attorneys' fees, which shall be limited to $75.00 per hour to any attorney representing the complainant during the administrative process. The reasonableness of the hours billed by either the neutral third party or a complainant's attorney shall be subject to review by the District Court upon objection by the defendants. The burden of establishing the reasonableness of the hours expended shall be on the neutral third party or the complainant's attorney, if applicable. The neutral third parties shall provide to the defendants at least once a calendar quarter for any quarter during which time is expended pursuant to this section, a statement of hours reasonably expended for which they

seek reimbursement. When a decision of a neutral third party becomes binding, applications for attorneys' fees by claimants who prevail under this alternative complaint process shall be submitted to defendants within 30 days after the date the decision becomes binding.

G. The proceedings on individual complaints in District Court shall be de novo and procedures, rights, and remedies relating thereto are governed by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16. Pursuant to Title VII an award of attorneys' fees may only be made to a prevailing party.

H. The right of employees or applicants for employment to utilize the complaint procedures applicable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., the Civil Service Reform Act of 1978, or a negotiated grievance procedure, shall be preserved for

actions occurring subsequent to the Court's approval of these modifications. However, a class member wishing to present a complaint which falls under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., the Civil Service Reform Act of 1978, a negotiated grievance procedure or the alternate complaints procedure set forth herein in Section 6 may present the complaint under one but not more than one of these authorities.

I. The creation of this alternate complaints procedure is intended to provide an expeditious process by which subclass members can exhaust their administrative remedies prior to filing a judicial complaint. In any subsequent judicial proceeding following the completion of the procedures set forth in this Section, no offer of settlement, acceptance of settlement, or settlement or conciliation discussions will be admissi-

ble as evidence in Court. The decision of the neutral third party is the final step in the administrative process. The decision of the neutral third party shall not be admissible in any subsequent proceeding for any purpose in District Court.

Section 7:

OPT OUT

A. Individual class members who received or were considered for relief pursuant to Section 3 of these modifications have the right to opt out of Section 3 of the modifications, if they have objected to the modifications and indicated in writing that they would desire to opt out. These class members who so opt out are bound by all other provisions of the Consent Judgment as modified. The only class members who meet the conditions for opting out and who may elect to do so are listed in Appendix 4.

B. A class member who opts out will

not be entitled to any relief pursuant to Section 3 of these modifications. Relief identified in the proposed modifications for individuals who opt out will be eliminated. A class member who opts out shall have his or her complaint heard before the District Court as a separate civil trial in this lawsuit. Attorneys' fees shall only be paid to a prevailing party in accordance with Title VII standards. The complainant is responsible for arranging for counsel's services.

C. After approval of these modifications, the Court will notify in writing class members listed in Appendix 4 that they are presumed to have opted out of the relief provided in Section 3 of these modifications.

D. If an individual notified pursuant to paragraph C of this section desires not to opt out, he or she must notify the Clerk of the District Court in

writing within 28 days from the date the Court issues such notice.

E. If an individual who opts out of these modifications wishes to pursue his or her claim against the defendants, he or she must file a claim of discrimination or retaliation in this lawsuit by April 24, 1985.

Section 8:

RELEASE

A. Approval by the Court of this modification of the Consent Judgment in Subclass A shall operate to discharge the defendants from all liability to members of Subclass A arising under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e, et seq., for all counts of racial discrimination or retaliation arising out of Subclass "A" employment and hiring at Eglin Air Force Base occurring on or before the date of the approval of the modification of the Consent Judgment

in Subclass A by the District Court, except the claims of those persons identified in Appendix 2.

B. No complaint filed after February 12, 1984, by any Subclass A member alleging racial discrimination or retaliation by defendants shall be deemed settled, compromised, concluded, or discharged by this modification of the Consent Judgment and all such complaints shall be processed as provided in Section 6 herein. The 90-day time limit as provided in Section 6 shall commence upon approval of this modification of this Consent Judgment in Subclass A.

The Order modifying the Consent Judgment in Subclass A is entered with the consent of the parties.

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Acting Asst. Attorney General

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Counsel For The National

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APPROVED this 25 day of January, 1985.

/s/Winstow E. Arnow
WINSTON E. ARNOW
Senior U.S. District Judge

Supreme Court, U.S.
FILED
OCT 16
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-177

# In the Supreme Court of the United States

OCTOBER TERM, 1985

VERNE ORR, SECRETARY OF THE AIR FORCE, ET AL.,
PETITIONERS

*v.*

WILLIAM C. TURNER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## REPLY MEMORANDUM FOR THE PETITIONERS

CHARLES FRIED
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*Department of Justice*
*Washington, D.C. 20530*
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BEST AVAILABLE COPY

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## REPLY MEMORANDUM FOR THE PETITIONERS

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In our petition, we argued that the court of appeals had misconstrued the terms of this consent decree, Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), and this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts,* No. 82-206 (June 12, 1984). We also showed why that court's construction of the decree has unnecessarily raised a substantial equal protection issue that is similar to the one pending before the Court in *Wygant* v. *Jackson Bd. of Educ.,* cert. granted, No. 84-1340 (Apr. 15, 1985). Respondent's brief in opposition, for the most part, simply reiterates the reasons given by the court of appeals for its decision and fails to respond to the arguments made in our petition stating why that decision is wrong. See Br. in Opp. 16-22, 34-39. Accordingly, only a few brief comments in reply are necessary.

1. a. Respondent argues (Br. in Opp. 14-15, 22-26) that the court of appeals' decision is insignificant because a particular provision in this decree authorizing the master to award "all appropriate relief" was simply one part of a complex enforcement mechanism that was unique to this case and, in any event, that provision has since been rescinded for cases not yet submitted or decided. We regret that the amendment prospectively rescinding that provision in the decree was only drawn to the attention of the Office of the Solicitor General by the respondent's brief in opposition, and welcome the circumstance that it is now before the Court. However, we do not believe that this amendment has the significance that respondent ascribes to it.

That amendment does not affect the legal issues presented by this case, because the amended decree does not apply to cases, like this one, that had already been decided by the master at the time that amendment went into effect. See Br. in Opp. App. 14a-15a.[1] Nor does it render this case moot, because there is still a controversy between petitioners and respondent regarding the validity under Section 706(g) and the Fifth Amendment of the master's November 28, 1983, order.

As our petition pointed out (Pet. 13-14), the Title VII question presented by this case is essentially identical to the questions presented in *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland* (*Vanguards*), cert. granted,

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[1]The appendix to respondent's brief in opposition does not reprint the appendices to the amended decree. Raymond Little is listed in Appendix 2 of the amended decree, which is referred to at Br. in Opp. App. 14a.

No. 84-1999 (Oct. 7, 1985), *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC,* cert. granted, No. 84-1656 (Oct. 7, 1985), both of which were pending on petitions for writs of certiorari at the time that we filed our petition in this case. We presented this case—the only case then decided by the courts of appeals in which federal parties appeared as defendants—to the Court along with *Vanguards* and *Local 28* as an example of the confusion that had developed in the lower courts with respect to the validity and construction of consent decrees in Title VII litigation. Particularly troublesome in this case is the court of appeals' holding that Section 706(g) is wholly inapplicable as a matter of law to any consent decree, not simply to this one. See Pet. App. 13a-17a.[2] It is that ruling which we believed would warrant review by this Court, not merely any particular feature of this decree.

Moreover, we advised the Court in the petition of our view that the Sixth Circuit's decision in *Vanguards* provided a better vehicle for the Court to resolve the Title VII question that is also presented here. Our submission on this question was that the Court should dispose of this case as appropriate in light of the Court's disposition of *Vanguards*; we asked the Court to grant plenary review of this case only if the petition in *Vanguards* were denied (Pet.

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[2]The court of appeals was quite explicit on this point. See Pet. App. 14a ("[t]his provision [Section 706(g)] merely limits the power of a court to order certain remedies under Title VII in the absence of a finding that the promoted individual was a victim of discrimination. It does not limit the remedies to which parties may voluntarily agree under a consent judgment"). The Eleventh Circuit's subsequent decision in *Paradise* v. *Prescott,* 767 F.2d 1514 (1985), has confirmed that the court of appeals' ruling in this case applies to every consent decree and not simply to this one. See *id.* at 1529 ("[t]his court stated in *Turner* that neither Section 706(g) nor the *Stotts* case, prevents a court from approving a consent decree that provides relief which is consistent with, but goes beyond, that authorized in the underlying statute").

13-14, 25). In his brief in opposition, respondent has made no effort to distinguish this case from *Vanguards* (or from *Local 28*). After respondent's brief in opposition was filed, the Court granted the petitions in *Vanguards* and *Local 28*. Given the Court's actions in those cases, it is appropriate to hold the petition in this case pending the outcome of *Vanguards* and *Local 28*.

b. Respondent claims (Br. in Opp. 26-32) that the court of appeals' decision is unexceptional because the district court had the inherent authority to award him a promotion by virtue of its contempt power.[3] However, the relationship between a court's contempt power and Section 706(g) of Title VII is one of the issues before the Court in *Local 28*. Accordingly, respondent's argument provides no basis for declining to hold this case pending the outcome of *Local 28* or the other cases that are presently before the Court.[4]

c. In addition, respondent argues (Br. in Opp. 7-13, 40) that review by this Court is not warranted because he would be entitled to show that he was the victim of discrimination even if the judgment below were to be reversed and because the evidence adduced at the hearing before the master supports that claim. We agree that respondent would be

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[3]The district court did not rely on its contempt power in this case; rather, the master and the district court both relied upon the consent decree itself.

[4]Respondent's argument that no one objected to the decree itself prior to the master's November 28 order (Br. in Opp. 14, 17-19) is wide of the mark. There was no reason (or opportunity) for any innocent third-party to object to the decree before the master entered that order unless the decree awarded absolute preferences in hiring or promotion on the basis of race to class members, which respondent himself argues that the decree did not. See Br. in Opp. 38. Indeed, elsewhere in his brief in opposition (at 34-35) respondent appears to agree that the master's November 28 order, not the consent decree, is the focus of the dispute in this case.

entitled to appropriate "make whole" relief under Section 706(g) if he can prove that he was a victim of discrimination (Pet. 17); indeed, our disagreement with the court of appeals was that the court has eliminated any need to make this inquiry where a consent judgment is involved.[5] It is because the court of appeals has effectively eliminated this inquiry in any case involving a consent decree that this case should be held pending the Court's disposition of *Vanguards* and *Local 28*.[6]

2. Respondent contends that the equal protection question presented by this case does not warrant this Court's review for two reasons. To begin with, respondent claims (Br. in Opp. 34-35) that no innocent third parties were

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[5]We also note that it is speculative whether respondent can make that showing. The master did not find that respondent had suffered discrimination, as respondent acknowledges. Br. in Opp. 12-13. In addition, much of the evidence upon which he relies and to which the court of appeals adverted (see Pet. App. 7a-8a) was either in dispute (compare 3 Tr. 235 (testimony by respondent that he received a shorter interview than the person selected for the position) with 10/7/83 Tr. 9, 10 (contrary testimony by a selection committee member)), is irrelevant (Br. in Opp. 8 ("[t]he selection was made by an all-white selection panel")), or offers an incomplete picture of the record (compare, *e.g.*, 2 Tr. 15-16, cited at Br. in Opp. 11-12 n.4 as 4 Tr. 15-16 (direct examination testimony of EEO investigator that his recommendations were altered by his supervisor) with 2 Tr. 33-34 (cross-examination testimony of EEO investigator admitting that he was criticized by his supervisor for preparing inadequate reports).

[6]Respondent erroneously asserts (Br. in Opp. 32-33) that Section 717 of Title VII, 42 U.S.C. 2000e-16, which was added in the 1972 amendments to that Act, supports the court of appeals' decision. Neither Section 717 nor the 1972 amendments to Title VII, considered as a whole, modified the pertinent language in Section 706(g) or altered its effect. See *Stotts*, slip op. 18-19 n.15 (1972 amendments to Section 706(g) did not modify the limitations upon a court's authority to award relief that are imposed by that section); Pet. 18, 20 n.21. Indeed, Section 717(d), 42 U.S.C. 2000e-16(d), expressly provides that Section 706(g) "shall govern" civil actions brought against the federal government under the 1972 amendments.

harmed by the master's November 28 order because the position that he received was vacant and because no third party has objected to that order. Like the courts below, however, respondent has overlooked the fact that the master's November 28 order denied innocent third parties the opportunity to apply for the position that he was given (see Pet. 16). Respondent also argues (Br. in Opp. 35-39) that the consent decree created an affirmative action program similar to the one that was upheld in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). However, respondent, like the court of appeals, has confused the terms of the decree with the terms of the master's November 28 order. As as we have explained (Pet. 20 n.21, 22-23), the government did not voluntarily elevate respondent to his current position under an affirmative action program; rather, the master ordered petitioners to put respondent in that position as a remedy purportedly authorized by the decree for the violation of the judgment. Accordingly, *Weber* simply has no bearing on this case. What is more, *Weber* expressly reserved the question whether the government may constitutionally adopt an affirmative action program like the one at issue there (443 U.S. at 200), and that question is similar to the one presently before the Court in *Wygant*, which respondent has made no effort to distinguish.

For the foregoing reasons, as well as those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, cert. granted,

No. 84-1656 (Oct. 7, 1985), *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland* (*Vanguards*), cert. granted, No. 84-1999 (Oct. 7, 1985), and *Wygant* v. *Jackson Bd. of Educ.*, cert. granted, No. 84-1340 (Apr. 15, 1985).

CHARLES FRIED
*Acting Solicitor General*

OCTOBER 1985